LEMBAGA JURUTERA MALAYSIA

v.

LEONG PUI KUN

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
DENIS ONG JCA
VINCENT NG J
[CIVIL APPEAL NO: W-02-930-2001]
20 SEPTEMBER 2007

PROFESSIONS: *Engineers - Registration - Cancellation - Certiorari and mandamus - Disciplinary proceedings - Whether there were breaches of procedural fairness and natural justice - Registration of Engineers Act 1967, s. 15(2) - Federal Constitution, arts. 5(1), 8(1)*

ADMINISTRATIVE LAW: *Remedies - Certiorari and mandamus - Cancellation of registration as professional engineer - Disciplinary proceedings - Whether there were breaches of procedural fairness and natural justice - Registration of Engineers Act 1967, s. 15(2) - Federal Constitution, arts. 5(1), 8(1)*

ADMINSTRATIVE LAW: *Rules of natural justice - Cancellation of registration as professional engineer - Certiorari and mandamus - Disciplinary proceedings - Whether there were breaches of procedural fairness and natural justice - Registration of Engineers Act 1967, s. 15(2) - Federal Constitution, arts. 5(1), 8(1)*

CONSTITUTIONAL LAW: *Fundamental liberties - Fundamental rules of natural justice - Cancellation of registration as professional engineer - Certiorari and mandamus - Disciplinary proceedings - Whether there were breaches of procedural fairness and natural justice - Registration of Engineers Act 1967, s. 15(2) - Federal Constitution, arts. 5(1), 8(1)*

LABOUR LAW: *Employment - Disciplinary proceeding - Cancellation of registration as professional engineer - Certiorari and mandamus - Whether there were breaches of procedural fairness and natural justice - Registration of Engineers Act 1967, s. 15(2) - Federal Constitution, arts. 5(1), 8(1)*

The applicant in the court below ('applicant') applied to the High Court for an order of *certiorari* to quash the order of the Board of Engineers ('Board'), the respondent in the court below ('respondent'), cancelling the applicant's registration as a

professional engineer with the respondent ('said order'). The applicant also applied for an order of *mandamus* directing the respondent to reinstate the applicant as a professional engineer registered with the respondent. The applicant averred that the said order was issued *ultra vires* and it resulted in his livelihood being curtailed, as he was no longer allowed to practise as a professional engineer and, further, had suffered loss of reputation and general damages. The applicant also claimed that he had, through his firm, entered into a contract for a proposed development project, which he had to cancel due to the said order. As such, he brought an action against the respondent claiming damages. The learned judge allowed the application, holding that there was non-compliance with the Registration of Engineers Act 1967 ('Act'), and breaches of natural justice and procedural fairness as well. Hence, the present appeal by the respondent, in which it submitted that the learned judge erred in law and in fact in holding that disciplinary proceedings under the Act were required to be adversarial and/or analogous to court procedure, and further, that the respondent had to prove such charges against the applicant beyond reasonable doubt. As such, the learned judge wrongly concluded that there were breaches of natural justice and/or procedural fairness by the respondent in adopting an investigatory procedure at disciplinary hearings.

Held (dismissing the appeal)

Per Mokhtar Sidin JCA delivering the judgment of the court:

(1) Section 15(2) of the Act clearly sets out that the Board shall not make any order suspending or cancelling the registration of any engineer, unless there has been a hearing at which at least two-thirds of the total number of members of the Board are present. The respondent had submitted that the quorum was 11. The total number of gazetted members of the Board at the material time was 17, which meant that two-thirds would be 11.33. Indeed, unless one of the members of the tribunal was one-third more than a normal human being, the quorum must be 12. The respondent had no business rounding the quorum down to 11. Quite simply, the maxim *verbis legis non est recedendum* applied *viz*. no departure is permitted from the words of a statute. Furthermore, from the evidence given by the applicant, which was not disputed, only nine persons were present throughout the three dates of the

hearing and the deliberations. That being said, the respondent had clearly not complied with the mandatory quorum of 12. (para 13)

(2) The respondent stated that the Board's function at disciplinary hearings is investigatory in nature and not adversarial. It was this line of thinking, which was a clear indictment of the respondent's failure to distinguish between its earlier role to investigate into any incident and its later role as a tribunal, which had given rise to the breaches of natural justice and procedural fairness. This was clearly in open defiance of s. 15(2) of the Act and arts. 5(1) and 8(1) of the Federal Constitution which requires that in any hearing involving the issue of misconduct, there must be due observation of procedural fairness. Indeed, the concept that the Board's function at disciplinary hearings is investigatory in nature and not adversarial is totally anathema in Malaysian legal jurisprudence and smacks of powers given only in a police state. (para 13)

(3) Section 15(2)(b) of the Act clearly spells out that an opportunity of being heard must be given to the registered engineer against whom the Board intends to make the order. In this instance, the respondent's failure to produce a complainant at the hearing and to identify who the complainant actually was clearly deprived the applicant of its inalienable fundamental right to question the person who had complained against him. The respondent had accepted the charges as proven and the hearing only a formality, with the respondent in fact arriving at a conclusion even before carrying out the said formality. This could be seen from the active role assumed by the chairman of the tribunal in discharging his duty not only as an adjudicator but also as prosecutor. The statements by various other members of the tribunal, on the evidence, also showed that they were biased. (para 13)

(4) It is fundamental that a wrong is not presumed. The Latin maxim "*injuria non praesumitur*" sets out the point that just as guilt is never presumed in criminal matters, so in civil cases no one is presumed to have done a wrong or injurious act. It must be proved by he who complains of it. The respondent's submission that it need not adduce any evidence at the hearing since there was no requirement for any form of

procedure to be followed ran contrary to this maxim. This submission also reinforced the applicant's contention that the respondent had not properly laid down the procedures for the applicant to properly defend himself. The respondent had placed the burden of proof on the applicant, presuming that the applicant was guilty, which was contrary to the law and to the rules of natural justice and procedural fairness. It was wrong for the respondent to state that the report and the charges stood by themselves, since for a charge to be established the Board must adduce evidence to prove the charge. The failure to do so would mean that the charges had not been proven beyond reasonable doubt. (para 14)

(5) The attendance list clearly showed that there were non-members of the tribunal who were present during the deliberations leading to the decision. It was simply repugnant to natural justice that persons who were not members of the tribunal were present during the deliberations even if they did not participate, as their very presence gave rise to the likelihood that they may have influenced the decision-makers. The question was not whether there was actual prejudice against the applicant or not but whether there was a "real likelihood" of bias on the facts of the case. In this case, the Secretary of the Board, who had co-authored the technical investigation report that had been relied upon to prefer the charges against the applicant, was not only present but had also participated in the deliberations, which was in fact actual bias on the part of the respondent. (para 14)

(6) Having gone through the voluminous record of appeal, it was clear that the learned judge had studied all the evidence produced before him and come to conclusion that the respondent had failed to act honestly and by honest means. The learned judge supported his judgment with the relevant laws and authorities, and there was no merit in the respondent's contentions that the learned judge had erred in law and in fact. (paras 15, 16 & 17)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon di mahkamah di bawah ('pemohon') telah memohon perintah *certiorari* di Mahkamah Tinggi untuk membatalkan perintah Lembaga Jurutera ('Lembaga'), responden di mahkamah di bawah ('responden'), kerana membatalkan pendaftarannya sebagai seorang jurutera profesional dengan responden ('perintah tersebut').

Pemohon juga memohon satu perintah *mandamus* bagi mengarahkan responden menerimanya kembali sebagai jurutera profesional yang berdaftar dengan responden. Pemohon berhujah bahawa perintah tersebut telah dikeluarkan secara *ultra vires* dan telah menyekat mata pencariannya, kerana beliau tidak lagi boleh beramal sebagai seorang jurutera profesional, dan lebih dari itu, beliau juga telah menanggung malu dan dan mengalami kerugian am. Pemohon mendakwa selanjutnya bahawa melalui firmanya beliau telah memasuki suatu kontrak untuk satu cadangan projek, tetapi terpaksa membatalkannya disebabkan oleh perintah tersebut. Oleh yang demikian, beliau telah memulakan guaman terhadap responden bagi menuntut gantirugi. Yang arif hakim membenarkan permohonan, sekaligus memutuskan bahawa terdapat ketidak-patuhan terhadap Akta Pendaftaran Jurutera 1967 ('Akta') serta pelanggaran terhadap keadilan semulajadi dan keadilan prosedur. Responden merayu dan berhujah bahawa yang arif hakim khilaf di sisi undang-undang dan fakta apabila mendapati bahawa prosiding disiplin di bawah Akta hendaklah berbentuk adversarial dan/atau menyamai prosedur mahkamah, dan bahawa responden harus membuktikan dakwaan-dakwaan terhadap pemohon di luar keraguan munasabah. Dapatan-dapatan ini, menurut responden, membawa kepada rumusan-rumusan salah oleh yang arif hakim bahawa wujud pelanggaran terhadap keadilan semulajadi dan/atau keadilan prosedur oleh responden apabila menggunapakai prosedur investigatori di perbicaraan disiplin.

Diputuskan (menolak rayuan)
Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 15(2) Akta memperuntukkan dengan jelas bahawa Lembaga tidak boleh membuat apa-apa perintah untuk menggantung atau membatalkan pendaftaran mana-mana jurutera, kecuali melalui suatu pendengaran di mana sekurang-kurangnya dua pertiga dari semua ahli-ahli Lembaga hadir. Responden menyatakan bahawa korumnya adalah 11. Namun, jumlah ahli Lembaga yang digazetkan pada waktu material adalah 17, yang bermakna bahawa dua pertiga darinya adalah 11.33. Oleh itu, kecualilah jika salah seorang dari ahli tribunal tersebut adalah se pertiga lebih dari seorang manusia biasa, korumnya yang betul adalah 12. Jelasnya, maksim *verbis legis non est recedendum*, iaitu tiada penyimpangan dari perkataan statut harus dibenarkan, adalah terpakai. Selain dari itu, dari keterangan yang diberikan pemohon, yang tidak dipertikai,

hanya sembilan orang hadir di sepanjang ketiga-tiga tarikh pendengaran dan penyiasatan. Maka responden jelas tidak mematuhi korum mandatori 12 orang ini.

(2) Responden menyatakan bahawa fungsi Lembaga di pendengaran disiplin adalah berbentuk investigatori dan bukannya adversarial. Jalur pemikiran inilah, yang berpunca dari kegagalan responden untuk membezakan fungsi awalnya untuk menyiasat mana-mana insiden dengan tugas berikutnya sebagai sebuah tribunal, yang menyebabkan berlakunya pelanggaran terhadap keadilan semulajadi dan keadilan prosedur. Ini jelas melanggar s. 15(2) Akta dan fasal 5(1) dan 8(1) Perlembagaan Persekutuan yang menetapkan bahawa dalam mana-mana pendengaran yang melibatkan isu salah laku, keadilan prosedur hendaklah dipatuhi. Malahan, konsep bahawa fungsi Lembaga di pendengaran disiplin hanyalah bersifat investigatori dan bukannya adversarial adalah ditolak oleh jurisprudens undang-undang Malaysia dan hanya melambangkan kuasa-kuasa yang diberi di dalam negara polis.

(3) Seksyen 15(2)(b) Akta menyatakan dengan jelas bahawa peluang untuk didengar hendaklah diberi kepada jurutera berdaftar jika Lembaga berhasrat untuk membuat perintah terhadapnya. Dalam kes semasa, kegagalan responden untuk mengemukakan seorang pengadu semasa pendengaran dan untuk mengenalpasti siapa sebenarnya pengadu itu jelas telah menidakkan hak asasinya pemohon untuk menyoal orang yang membuat aduan terhadapnya. Responden telah menerima pertuduhan sebagai dibuktikan dan menganggap pendengaran hanya sebagai satu formaliti, dan malah sebenarnya telah mencapai keputusan sebelum melaksanakan formaliti tersebut. Ini dapat dilihat dari peranan aktif yang dimainkan oleh pengerusi tribunal ketika melaksanakan tanggungjawabnya, yang bukan hanya bertindak sebagai pengadil tetapi juga sebagai pendakwa. Kenyataan-kenyataan yang dibuat oleh ahli-ahli tribunal lain juga, berdasarkan keterangan, menunjukkan bahawa mereka berlaku berat sebelah.

(4) Adalah sesuatu yang asas bahawa kesalahan tidak boleh dianggapkan. Maksim Latin "*injuria non praesumitur*" menerangkan bahawa sebagaimana kebersalahan tidak boleh dianggapkan di dalam hal-hal jenayah, begitulah juga dengan kes-kes sivil di mana tiada siapa pun boleh dianggap melakukan kesalahan atau perbuatan-perbuatan yang memudaratkan. Ia

hendaklah dibuktikan oleh orang yang mengadu. Hujah responden bahawa ia tidak perlu mengemukakan sebarang bukti di pendengaran disebabkan tiada apa-apa prosedur khusus untuk diikuti adalah bertentangan dengan maksim ini. Hujah ini juga mengukuhkan pengataan pemohon bahawa responden gagal meletakkan garis-garis prosedur yang teratur bagi membolehkan beliau mempertahankan dirinya dengan cara yang wajar. Responden telah meletakkan beban membukti ke atas pemohon, dan membuat andaian bahawa pemohon bersalah, di mana ini jelas bertentangan dengan undang-undang, kaedah-kaedah keadilan asasi dan keadilan prosedur. Adalah salah bagi responden untuk menyatakan bahawa laporan dan pertuduhan-pertuduhan berdiri dengan sendirinya, kerana, untuk sesuatu pertuduhan menjadi terbukti, Lembaga mestilah mengemukakan keterangan-keterangan bagi membuktikannya. Kegagalan berbuat demikian bererti pertuduhan-pertuduhan gagal dibuktikan di luar keraguan munasabah.

(5) Senarai kehadiran jelas menunjukkan bahawa terdapat orang-orang yang bukan ahli tribunal menghadiri deliberasi yang membawa kepada keputusan. Adalah bertentangan dengan keadilan asasi bahawa orang-orang yang bukan ahli tribunal hadir semasa deliberasi walaupun jika mereka tidak mengambil bahagian, kerana kehadiran mereka semata-mata pun boleh membangkitkan kemungkinan bahawa mereka mungkin akan mempengaruhi pembuat-pembuat keputusan. Persoalannya bukan sama ada terdapat prejudis sebenar terhadap pemohon ataupun tidak, tetapi sama ada terdapat "kemungkinan sebenar" berlakunya berat sebelah berdasarkan fakta kes. Dalam kes ini, Setiausaha Lembaga, yang sama-sama menyediakan laporan teknikal penyiasatan yang dijadikan pergantungan bagi membuat pertuduhan-pertuduhan terhadap pemohon, bukan sahaja hadir tetapi juga mengambil bahagian di dalam deliberasi, yang mana ini menyebabkan berlakunya berat sebelah sebenar di pihak responden.

(6) Atas penelitian keseluruhan rekod rayuan, jelas bahawa yang arif hakim telah mentelaah semua keterangan yang dikemukakan di hadapannya sebelum mencapai rumusan bahawa responden gagal untuk bertindak jujur dan dengan cara-cara yang jujur. Yang arif hakim telah menyokong penghakimannya dengan undang-undang dan autoriti-autoriti relevan, dan tiada merit pada hujah responden bahawa yang arif hakim telah khilaf di sisi undang-undang dan fakta.

Legislation referred to:
Registration of Engineers Act 1967, s. 15(2)
Rules of the High Court 1980, O. 53 r. 3(2)

For the appellant - Rajendra Navaratnam (Chu Ai Li with him); M/s Azman, Davidson & Co
For the respondent - Vincent Lim (HL Yap with him); M/s Vincent Lim & Partners

[Appeal from High Court, Kuala Lumpur; Application for Judicial Review No: R2-25-28-2001]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:

[1] In this appeal the respondent who was the applicant in the court below applied to the High Court for an order of *certiorari* to quash the order of the Board of Engineers, Malaysia (the appellant) dated 9 October 2000. The applicant also applied for an order of Mandamus to direct the appellant, the respondent in the court below, to reinstate the applicant as a professional engineer registered with the Board of Engineers, Malaysia, and for the order of the Board of Engineers dated 9 October 2000 be quashed. The learned judge allowed the application. The Board of Engineers then appealed to this court. We have dismissed the appeal earlier. We now give our reasons doing so.

[2] In order to avoid any confusion I will refer to the parties as they were in the court below. The applicant was at all material times, a professional engineer registered with the Board of Engineers, Malaysia and the principal partner of the firm of PKKL Partners Sdn Bhd. The respondent, the Board of Engineers, Malaysia, is a body corporate established under the Registration of Engineers Act 1967, and are at all material times, having their address at Tingkat 17, Ibu Pejabat JKR, Kompleks Kerja Raya Malaysia, Jalan Sultan Salahuddin, 50580 Kuala Lumpur. The respondent had, *via* a letter dated 9 October 2000, ordered the cancellation of the applicant's registration as a professional engineer with the Board (hereinafter referred to as "the said order"). In his statement pursuant to O. 53 r. 3(2) of the Rules of the High Court the applicant avers that the said order was issued *ultra vires* and/or was wrongfully issued, on the following grounds:

(a) That the Board of Engineers, Malaysia had acted *ultra vires* by issuing the order canceling the registration of the applicant on 9 October 2000 (hereinafter referred to as the "said order") when it was improperly and/or not properly constituted, and/or was not empowered to do so in accordance with the Registration of Engineers Act 1967 (hereinafter referred to as "the Act").

(b) That the Board of Engineers, Malaysia (hereinafter referred to as "the board") failed to observe the rules of natural justice and/or procedural fairness by its failure to establish proper procedures in the hearing thereby depriving the full and proper exercise of the applicant's rights to a fair hearing.

(c) The board had acted *ultra vires* its statutory authority in the manner in which the hearing was conducted, by failing to appreciate that in the case of a disciplinary hearing, under the Malaysian system of justice, the process is adversarial and not inquisitonal.

(d) That the board had breached the rules of natural justice and/or procedural fairness and had showed its bias in, *inter alia*:

(i) when it decided to proceed on four additional charges over and above a single charge proposed by the Ad-Hoc Committee investigating into the applicant's conduct ("the Ad-Hoc Investigation Committee");

(ii) when the board decided that it was not bound to accept the Investigation Committee's advice and in so doing had acted as prosecutor and judge in the same cause.

(e) That the board failed to observe the rules of natural justice and/or procedural fairness by its failure to identify to the applicant who the complainant was and/or its failure to produce a complainant and/or a complaint at the hearing, thereby depriving the applicant of his full and proper exercise of his rights to a fair hearing.

(f) That the board had erred in law and breached the rules of natural justice and/or procedural fairness in holding that the existence of the complaint from the Majlis Perbandaran Shah Alam ("MPSA") was not relevant to the validity of the charges and that the board was entitled in law to act in the absence of complaints and/or complainants.

(g) That the board failed to observe the rules of natural justice and/or procedural fairness and had shown its bias in making an adverse presumption that the applicant was guilty until found innocent, by imposing the burden of proof onto the applicant, in calling for the applicant to answer the charges when no witnesses had been called or any evidence proffered whatsoever against the applicant at the hearing.

(h) That the board failed to observe the rules of natural justice and/or procedural fairness by its failure to give any explanation on the burden of proof and the standard of proof to the applicant.

(i) That the Board failed to observe the rules of natural justice and/or procedural fairness, by its failure to inform the applicant as to how his conduct had adversely affected public interest as stated in the charges, thereby depriving the applicant of the full and proper exercise of his rights to a fair hearing.

(j) That the Board failed to observe the rules of natural justice and procedural fairness when the board failed to furnish and/or disclose to the applicant, in advance of the hearing, all the relevant documents and/or information in its possession and also when it improperly received evidence in absence of the applicant and/or his counsel after the hearing.

(k) That the Board failed to observe the rules of natural justice and procedural fairness by reason of the presence and/or participation of the Secretary of the Board, one Ir. Dr. Judin bin Hj. Abdul Karim (who was a party to the Technical Investigation Report relied upon by the Ad-Hoc Investigation Committee) at the hearing and/or at the deliberations of the Board in arriving at its decision.

(l) That the Board failed to observe the rules of natural justice and procedural fairness, *inter alia*:

(i) by the presence and/or participation of a representative of the board's legal advisor, one Messrs. Azman Davidson & Co. (who had been involved earlier in preparation of the case for prosecution) at the deliberations of the Board, in arriving at its decision;

(ii) in improperly receiving legal advice from the said legal advisor, after the hearing was closed, and in acting on the said advice without disclosing what this was to the applicant thereby further depriving the applicant of a proper opportunity to argue his case;

(iii) by the presence of a Member of the Board, who had not heard all the evidence, at the deliberations of the board in arriving at its decision and/or his participation in the Board's decision.

(m) That the Board failed to observe the rules of natural justice and procedural fairness in its adjudication, and had acted contrary to the provisions of the Federal Constitution.

[3] The applicant claimed that by reason of the said order, the applicant's livelihood had been curtailed, as he was no longer allowed to practice as a professional engineer by reason of his deregistration, and further, the applicant has suffered loss of reputation and general damages as a result thereof. The applicant also claimed that he had, through his firm, entered into a contract for his services as a professional engineer before the cancellation of his registration on 9 October 2000, namely one "Proposed Development at Taman Perkasa, Phase 2, Mukim & Daerah Hulu Langat, Selangor Darul Ehsan". As a result of the said order, the applicant has had to cancel the said contract and/or withdraw his services, and by reason thereof, has suffered loss and damage in the sum of RM289,641.54. As such, the applicant claims against the defendant for the sum of RM289,641.54 and general damages together with interest at the rate of 8% per annum on the awarded sums and costs.

[4] In the affidavit in support of his application, the applicant stated:

3. I verily state that I had received a show cause letter dated 11-11-1998 from the Board informing me that, pursuant to a complaint it had allegedly received from the Majlis Perbandaran Shah Alam (hereinafter referred to as "MPSA") regarding the collapse of the Linkway Bridge at Matsushita Television Co. Sdn Bhd Shah Alam, and following investigations conducted by the Board, the Board had decided to hold a hearing under Section 15(2) of the Registration of Engineers Act 1967 (hereinafter referred to as "the Act"), I was required to answer to the charges contained therein. A copy of the said show cause letter is

annexed hereto and marked as EXHIBIT "LPK1". This show cause letter was related to an incident which happened in 16-9-1995, some 3 years ago.

4. I had subsequently through my then solicitors, Messrs. Noor Nilam PY Yap & Associates (hereinafter referred to as "my then Solicitors"), filed my reply against the said charges, *via* a letter dated 7-1-1998. A copy of the said reply is annexed herewith and marked as EXHIBIT "LPK-2".

5. Verily wish to state as follows:

(a) My then solicitors had on numerous occasions, written to the Board requesting for, *inter alia*, the following:

(i) documents and/or reports relating to the charges, emphasizing that it was necessary in the interest of natural justice that we received the relevant reports in connection with my case; and

(ii) for confirmation as to who the complainant was, *vis-à-vis* the said charges.

Copies of the relevant letters are annexed herewith and marked as EXHIBIT "LPK-3".

(b) The Board had subsequently replied to my then solicitors, *via* a letter dated 17-5-1999, and had requested them to collect a copy of the report which was known as "The Technical Investigation Report" prepared by the Technical Sub-Committee of Investigation. Copies of the Board's said letter together with the receipt thereof and the Technical Investigation Report are annexed herewith and marked as EXHIBIT "LPK-4" and EXHIBIT "LPK-5" respectively.

6. I veriIy state that the Board had then fixed the matter for hearing on 9-8-1999 in spite of the various preliminary objections taken by my counsel on, *inter alia*, the matters of jurisdiction and *ultra vires*, the proceedings proceeded on the said day. With the assent of the Board, my Counsel had then, on 1-1-1999 submitted his written submissions. A copy of the written submissions is annexed hereto and marked as EXHIBIT "LPK-6". A copy of the Notes of Transcript of Hearing (hereinafter referred to as "the Transcript of Hearing") which were compiled from tape recordings of the Hearing by the Board, were also supplied to the Board. A copy of the Transcript of Hearing together with the cover

letter thereto is annexed hereto and marked as EXHIBIT "LPK-7". I crave leave of this Honourable Court to refer to the Transcript of Hearing at the Hearing.

7. I verily state further, that the Board had, *via* their letter dated 9-10-2000, ordered the cancellation of my registration as a Professional Engineer with the Board, effective from 9-10-2000 (hereinafter referred to as "the Order"). This Order had, in effect, curtailed my livelihood, as I had been practicing engineering ever since I graduated in civil engineering from the University of Malaya in 1977. A copy of the said Order is annexed hereto and marked as EXHIBIT "LPK-8".

8. I am advised by my Solicitors and verily believe that the Order of the Board was *ultra vires*, as it was made without jurisdiction and contrary to the principles of natural justice and/or procedural fairness. I am further advised by my Solicitors and verily believe that as my entire livelihood was affected, the Order was also made contrary to Articles 5(1) and 8(1) of the Federal Constitution.

9. I verily state that my Solicitors had *via* a letter dated 30-10-2000 to the Board, requested for certain information from the Board, particulars of which are set out in the said letter. I am advised by my Solicitors and verily believe that to date, they have yet to receive a reply. A copy of the said letter dated 30-10-2000 is annexed hereto and marked as EXHIBIT "LPK-9".

10. I wish to bring to the attention of this Honourable Court that the Board had, *via* a letter dated 10-10-2000 informed me, *inter alia*, that they had already sent my de-registration for gazette on 13-7-2000. This was in spite of the fact that the order was only issued on 9-10-2000. I verily state that this fact had not been made known to me until the receipt of the said letter from the Board on 14-10-2000. A copy of the said letter is annexed hereto and marked as EXHIBIT "LPK-10".

11. I verily state that I had on 27-10-2000 filed an appeal to the Appeal Board of the Board appealing against the said Order. I am advised by my Solicitors and verily believe that notwithstanding the Appeal, this application can still be made. A copy of the said Notice of Appeal and my Solicitors' letter dated 27-10-2000 are annexed hereto and marked as EXHIBIT "LPK-11".

12. I verily believe that the Board had acted *ultra vires* by issuing the Order canceling the registration of the Plaintiff on the 9.10.2000, when it was improperly and/or not properly constituted, and/or not empowered to do so in accordance with the Act, by reasons of the matters below:

(a) that the term of the Board members expire at the end of August of every year until re-appointment by the Minister concerned;

(b) that at the material time when the Order was made on 9-10-2000, the Board had no statutory authority, as at the material time, its members had not been duly appointed by the said Minister.

13. I verily believe that the Board, in its adjudication of my matter, was further improperly constituted, when it included the following:

(a) a Member of the Board who had not heard all the evidence, namely one Dato' Ir. Hj. Ahmad Zaidee Laidin, who was only present for part of the entire Hearing on 9-8-1999; and/or

(b) a Non-Member of the Board, namely one Dr Ir. Judin bin Abdul Karim, who was the Secretary of the Board.

14. I crave leave to refer to ground 4(b) of the Statement and wish to state that the Board had failed to establish any proper procedures of the Hearing on 9-8-1999. ....

(a) The Board was unclear as to how the representative of MPSA, one Cik Rose Zairani Marmuji, which the Board had alleged was the complainant, should be treated as a witness.

(b) There was no clear idea as to the order of witnesses as it seemed that after I had stated my case and called my witnesses, the Board could still proceed to call other witnesses.

(c) The Board was totally at sea as to the issue of whether the witness should be put on oath.

(d) The Board was unclear as to what the standard of proof was.

(e) The Board was unconcerned with proper procedures being adopted for the hearing.

15. I crave leave to refer to ground 4(c) of the Statement. I am advised by my Solicitors and verily believe that in the case of a disciplinary hearing, under the Malaysian system of justice, the process is an adversarial and not an inquisitorial one. I verily state that the Board had not called any witnesses to prove their case, and further, had conducted the Hearing in an inquisitorial manner. I set out herein, relevant extracts from the Transcript of Hearing (See EXHIBIT "LPK-7") to illustrate this.

...

Based on the above, I am advised by my Solicitors and verily believe that the manner in which the Hearing had been carried out was clearly beyond the authority of the Board to carry out a due hearing. In the present case, the Members of the Board had descended into the arena and joined in the fray, rendering the Hearing an inquisition of its own, aimed at finding me guilty of the said charges against me.

16. I am further advised by my Solicitors and verily believe that the Board had failed to distinguish their role as a judicial body at this hearing, from their role of the Investigation Committee, and had run foul of the rules of natural justice and in so doing had become a prosecutor and judge at the same cause. I set out herein further extracts from the Transcript of Hearing. (See Transcript of Hearing EXHIBIT "LPK-7").

17. I crave leave to refer to ground 4(d) of the Statement and to the Investigation Report by the Ad-Hoc Investigation Committee of the Board (hereinafter referred to as "the Ad-Hoc Committee Investigation Report"). A copy of the said report is annexed herewith and marked as EXHIBIT "LPK-12".

18. I verily state that the Ad-Hoc Investigation Committee had, after its investigations, resolved that there was only a *prima facie* case to answer a single charge. This is set out in Appendix A of the Ad-Hoc Committee Investigation Report (See pg. 12 of EXHIBIT "LPK-12"). However, the Board had instead, *via* their show cause letter dated 11.11.1998 added on four additional charges (See EXHIBIT "LPK-1").

19. I verily state that at the Hearing I had, through my counsel, objected to the additional charges, and had pointed out that the said charges went beyond the draft charge prepared by the Ad-Hoc Investigation Committee.

A

20. Further, I wish to bring to this Honourable Court's attention that the MPSA (the relevant local authority) had in evidence stated that they had not brought any charges against myself in respect of the various by-laws under the Selangor Uniform Building By-Laws 1986 ("UBBL") namely By-laws 5, 7 and 16 of the UBBL, which were referred to in charges 3, 4 and 5 respectively. ....

B

21. I am advised by my Solicitors and verily believe that it was wrong for the Board to add on four additional charges, which had not been considered by the Ad-Hoc Investigation Committee.

C

22. I next crave leave to refer to ground 4(e) and 4(f) of the Statement. The Board had *vide* their letter dated 11.11.1998 (See: EXHIBIT "LPK-1") had clearly stated that the complainant was MPSA. My then solicitors had, on numerous occasions, asked for confirmation from the Board as to who the complainant was in this case (See EXHIBIT "LPK-2" and "LPK-3"). However, we had not received any reply to this query.

D

E

23. I verily wish to state further that at the Hearing, my counsel had raised a preliminary point as to whether there was any complaint to the Board by MPSA or any of the member of the public *vis-à-vis* charges 3, 4 and 5. I set out hereunder the exchanges on this issue during the hearing as set out in the Transcript of Hearing (See EXHIBIT "LPK-7").

F

24. I verily wish to stress however, that contrary to a statement by the Chairman of the Board that MPSA had made a complaint on the collapse of the linkway bridge, it was later established during the hearing that MPSA had not complained on the collapse of the linkway bridge, nor had MPSA made any complaints at all about myself to the Board. This is clearly established below, from the Transcript of Hearing (See EXHIBIT "LPK-7").

G

25. I am advised by my Solicitors and verily believe that it was wrong for the Board to insist on proceeding with the charges without producing a complainant, especially when the Board had earlier informed me that the charges had emanated from a complaint by MPSA, as I have a fundamental right to know who my accuser is, and to have a proper opportunity to put forward my case.

H

I

26. I further wish to refer to a letter from the Board dated 12-5-2000, and my then solicitor's reply to the same dated 23-5-2000. Copies of the said letters are annexed hereto and marked as EXHIBIT "LPK-13"' and "LPK-14" respectively.

27. I am advised by my Solicitors and verily believe that the Board's letter dated 12-5-2000 (See EXHIBIT "LPK-13") clearly showed that the Board had accepted as a fact that there was no complaint from the MPSA, or any complainant at all. I am further advised by my Solicitors and verily believe that as such, the Board had erred in law. I verily state that in the present case, even if the Board could have stepped in as the complainant, I had not been afforded any opportunity to cross-examine the Board, as they had not proffered any witnesses on their behalf at the Hearing.

28. I next crave leave to refer to grounds 4(g) and 4(h) of the Statement and wish to state that it is clear from the Transcript of Hearing (See EXHIBIT "LPK-7") that the Board did not at any time give any explanation on the burden of proof, the standard of proof, and as to who was to bear the burden, at the commencement of the Hearing or at all. In fact, the Chairman of the Board had ordered that I come out with my defence "straightaway" after presenting the charges against me, because the Board had no witnesses

29. I am advised by my Solicitors and verily believe that the Board had unfairly imposed the burden of proof on myself, and had inferred the presumption that I was guilty until found innocent. This is further evident by the various statements made by the Chairman and members of the Board which are set out hereunder. (See EXHIBIT "LPK-7")

30. I next crave leave to refer to grounds 4(i) of the statement and wish to state that the charges 1 to 5 against me had made reference to the fact that I had failed to have full regard for the public interest. I wish to state that at no material time did the Board point out to me how I had failed to have full regard for public interest, or what was public interest. The only time this issue was referred during the Hearing is set out below as per the Transcript of Hearing (See EXHIBIT "LPK-7"). ....

...

I am advised by my Solicitors and verily believe that the Board's failure to explain the issue of public interest to me and/or its failure to show me any rules or guidelines as to what acts of default or misconduct would be considered by the Board to fall within the scope of public interest, has deprived me of the full and proper exercise of my rights to a fair hearing.

31. I next crave leave to refer to ground 4(j) of the Statement. I further crave leave to refer to the Board's letter dated 9-10-2000 (See: EXHIBIT "LPK-8") and note that the Board had received evidence on 25-3-2000 in arriving at their decision. I verily wish to state that neither my solicitors or myself are aware of this evidence, and as such, I am advised by my Solicitors and verily believe that the Board had improperly received this evidence, and in so doing had acted *ultra vires* in arriving at its decision.

32. I further refer to my Solicitor's letter dated 30.10.2000 (See EXHIBIT "LPK-9") wherein they had requested, *inter alia*, as to what evidence was received by the Board on 25-3-2000, and verily stress that there has been no reply to date.

33. I crave leave to refer to ground 4(k) of the Statement and verily believe that the presence of the Secretary of the Board, one Dr. Ir. Judin bin Abdul Karim (hereinafter referred to as "the Secretary of the Board"), at the hearing and during the deliberations of the Board in arriving at its decision, was contrary to the rules of natural justice, as there was bias or an extreme likelihood of bias in that he would or was likely to have influenced the members of the Board against myself.

34. I verily wish to state that the said Secretary of the Board was earlier involved in the preparation of the "Technical Investigation Report" (See: EXHIBIT "LPK-12"). This fact was not disclosed to me by the Chairman at the Hearing.

35. Whilst I had, through my counsel, consented to the Secretary of the Board asking questions in order to save time, I was surprised that instead of just asking questions he had stepped into the arena and joined the fray by "cross-examining" and criticizing my expert witness, one Associate Prof. Ang Thien Cheong of the Nanyang University, Singapore.

36. I verily wish to state that the Secretary of the Board had an "interest" in the matter, as the Technical Sub-Committee of Investigation had relied on, *inter alia*, the portion of the "Technical Investigation Report" on the design review and overall analysis headed by the said Secretary of the Board. As such, the Chairman should not have asked him to participate in the Hearing without first disclosing the Secretary of the Board's interest, and further, should not have allowed the Secretary of the Board to sit in any of the deliberations of the Board, as there was bias or extreme likelihood of bias in that he would have influenced the Board's decision. I set out hereunder the exchanges by the Secretary of the Board extracted from the Transcript of Hearing (See EXHIBIT "LPK-7") which went beyond mere questions by an expert.

37. I crave leave to refer to ground 4(1) of the Statement and verily believe that the Board's legal advisor should not have been present at any of the deliberations of the Board, as he had earlier been involved in the preparation of the prosecution against myself.

38. I verily believe that there was bias or an extreme likelihood of bias in his presence, as my preliminary objections against the charges on jurisdictional grounds and also on the issue of the "complainant" and the issue on the procedure were matters in which he would have had an interest, as he would have advised the Board on the same and/or ought to have advised the Board on the same. In any event, I verily believe that it was wrong for the Board to have received any legal advice after the Hearing without first informing me of what this advice was, as it is fundamental that I am able to appropriately reply to the same.

39. I further reiterate paragraph 13 above and wish to stress that the Board, in their deliberations had included a Member of the Board who had not heard all the evidence, and was only present for part of the entire Hearing on 9-8-1999, and in so doing had breached the rules of natural justice.

40. I am advised by my Solicitors and verily believe that the Board, in its adjudication of this matter had failed to observe the rules of natural justice and procedural fairness, and had acted contrary to the provisions of the Federal Constitution, in severely curtailing my livelihood as I was no longer allowed to practice as a professional engineer by reason of my de-registration. I further wish to state that I was not given an opportunity by the Board to be heard on the issue of punishment.

41. I verily wish to state that I had through my firm, entered into a contract for my services as a professional engineer before the cancellation of my registration on 9-10-2000, namely one "Proposed Development at Taman Perkasa, Phase 2, Mukim & Daerah Hulu Langat, Selangor Darul Ehsan". As a result of the said Order, I have had to cancel the said contract and/or withdraw my services, and by reason thereof, I have suffered loss and damage in the sum of RM289,641.54 being the balance fees payable [RM707,537.50 – RM417,896.04]. A copy of the invoice no: 1420 is annexed hereto and marked as EXHIBIT "LPK-I5".

42. I also state that I have suffered loss of reputation as a result of the said Order, and have suffered damages as a result thereof.

43. Based on the above, and on the grounds of this application contained in the Ex-Parte Originating Summons, I verily believe that the Order of the Board dated 9-10-2000 ought to be quashed and/or set aside on the grounds, *inter alia*, that it had breached the rules of natural justice and procedural fairness, and the Order was made *ultra vires*, and further, that I be reinstated as a professional engineer with the Board.

[5] As can be seen from the affidavit itself, the applicant cited a lot of transcripts of the proceedings at the tribunal which I felt would not be necessary to cite them here. One could find them in the appeal record. The affidavit amplified the grounds of his application for *certiorari* and *mandamus*. Since this is a trial by affidavit the applicant filed further affidavit affirmed on 15 December 2000. *Inter alia*, the further affidavit states:

3. I crave leave to refer to my solicitors' letter dated 30-10-2000 to the Board of Engineers, Malaysia which was marked as EXHIBIT "LPK-9" in my Affidavit in Support. I verily state that after the filing of my Affidavit in Support, my Solicitors have received a reply from the Board dated 20-112000. A copy of the same is now annexed hereto and marked as EXHIBIT "LPK-1S". The said reply had also enclosed the Grounds of Decision of the Board, a copy of which is also annexed hereto and marked as EXHIBIT "LPK-17".

4. I verily wish to state as follows: A

(a) My solicitors had, *via* a letter dated 1-12-2000, written to the Board informing them that the reply did not meet with their request as the Board did not reply to paragraphs (v) and (vi) of their earlier letter dated 30-10-2000 [See EXHIBIT "LPK-9"]. A copy of the said letter dated 1-12-2000 is annexed hereto and marked as EXHIBIT "LPK-18". B

(b) The Board had, *via* a letter dated 11-12-2000, informed that the decision which led to my deregistration was made on 11-4-2000. A copy of the said letter is annexed hereto and marked as EXHIBIT "LPK-19". C

5. I verily wish to state that pursuant to the Board's letter dated 11-12-2000 [See EXHIBIT "LPK-19"] the Board had confirmed that the Board members sessions 1999/2000 had expired on 22-8-2000 and the new members were appointed on 27-10-2000, which appointment was currently in the process of gazetting by the Ministry, whereas the order was made on 9-10-2000. D

6. I crave leave to refer to the Board's decision made on 11-4-2000 [See EXHIBIT "LPK-16" and "LPK-19"] and I am advised by my Solicitors and verily believe that the decision made on 11-4-2000 was *ultra vires*, in breach of natural justice and/or procedural fairness, in light of the following: E

(a) no order can be made unless there had been a Hearing at which at least 2/3 of the total number of members of the Board are present; F

(b) only 10 members of the Board who sat in the Hearing on 9-8-1999 were involved in making the decision on 11-4-2000, thereby failing to meet the prescribed 2/3 requirement [See EXHIBIT "LPK-16"]; G

(c) there were 3 other members of the Board present on 11-4-2000, who were not present at the Hearing on 9-8-1999 and therefore, as they had not heard the evidence, they should not have been involved in the deliberations of the Board in arriving at its decision and/or participated in the Board's decision. H

7. I am advised by my Solicitors and verily believe that the Board, in making its decision on 11-4-2000, had acted *ultra vires*, in breach of natural justice and/or procedural fairness as the decision was made before receiving my further I

submissions from my Counsel dated 23-5-2000, which they had only requested for *via* their letter dated 12-5-2000 [See EXHIBIT "LPK-13"].

8. It is evident from the Board's letters dated 9-10-2000 and [EXHIBIT "LPK-8"] and 20-11-2000 [EXHIBIT "LPK-16"] and the Board's Grounds of Decision [EXHIBIT "LPK-17"] that the Board had relied on the said further submission dated 23-5-2000, when such was clearly not the case, as the Board had by its own admission, made its decision on 11-4-2000.

9. I am advised and verily believe that the Board's conduct as set out aforesaid, and further, by gazetting my deregistration on 13-7-2000 [See: EXHIBIT "LPK-10"] before the order was made is *ultra vires*, and in breach of natural justice and/or procedural fairness.

10. I crave leave to refer to paragraph 41 of my Affidavit in Support and EXHIBIT"LPK-15" and annex herewith a copy of the contract signed between my then client and my firm, which I had to cancel and withdraw my services following my deregistration, and also copies of my income tax submissions for the year of 1999 and 2000 and Financial Statements of my firm, all marked collectively as EXHIBIT "LPK-20".

[6] The respondent's affidavit in reply was affirmed by Ashari bin Mohd Yakub, the Board's Registrar. The affidavit, *inter alia*, states:

4. In answer to paragraphs 4, 5 and 6 of the Applicant's affidavit, I wish to state that the Applicant's solicitors' letters referred to in those paragraphs made a request for two documents, namely:

(a) the "Report of the Technical Sub-committee of Investigation on the Collapse of the Linkway Bridge at Matsushita Television Co. Sdn. Bhd. Shah Alam" dated November 1995 (Volume 1 and 2) ("the Technical Sub-committee's Report"). (This report is prepared under the leadership of the Jabatan Kerja Raya, Negeri Selangor); and

(b) the Board's Ad-Hoc Committee's report into the Applicant's role as an engineer in the collapse of the linkway bridge referred to in the Technical Sub-committee's report.

Both the above documents requested by the Applicant's solicitors were supplied to them before the hearing of the disciplinary charges against the Applicant. The Technical Sub-committee's report was made available to the Applicant's solicitors on or around 17.5.1999 (see Exhibit "LPK-4" to the Applicant's affidavit). The Board's Ad-Hoc Committee's report was provided to the Applicant's solicitors' in November 1998, together with the Board's covering letter dated 27.11.1998. A copy of this letter is annexed to this affidavit as Exhibit "AMY-l". The Board's Ad Hoc Committee's report is annexed to the Plaintiffs affidavit as Exhibit "LPK-12".

5. In answer to paragraph 6 of the Applicant's affidavit, I wish to state that the Applicant, his supporting witnesses and his counsel were given an adequate opportunity to present the Applicant's case in opposition to the disciplinary disciplinary charges ranged against him.

6. In answer to paragraphs 7, 8, 9 and 10 of the Applicant's affidavit, I wish to state that:

   (a) the Board's decision on the charges against the Applicant and the decision to deregister him were made at the Board's meeting on 13.7.2000. This meeting also dealt with other matters in addition to the charges against the Applicant. I wish to state that the Board's letter of 11.12.2000 to the Applicant's solicitors wrongly stated that the date of the Board's decision on the charges brought against the Applicant was 11.4.2000. A copy of this letter appears as Exhibit "LPK-19" to the Applicant's further affidavit;

   (b) the members of the Board who made the decision on the charges against the Applicant and the decision to deregister him were present at the hearing of the said charges on 9.8.1999. Those members of the Board who did not attend the hearing on 9.8.1999 did not participate in the decision making process on the charges against the Applicant on 13.7.2000. The members of the Board who attended the hearing of the charges against the Applicant on 9.8.1999 and made the decisions to find him guilty on 4 of the said charges and to deregister him on 13.7.2000 were:

      (i) Dato Ir. Hj. Zaini bin Omar;

      (ii) Ir. Kol. Murad Hj. Jaafar;

      (iii) Ir. Sambanther Baskaran;

(iv) Dato' Ir. Hj. Keizrul bin Abdullah;

(v) Ir. Magdalene Tan Lee;

(vi) Dato Ir. Abu Hashim Abd. Ghani:

(vii) Ir. Choo Kok Beng;

(viii) Tn. Hj. Hashim Ismail;

(ix) Ir. Mohd Mazlan bin Ismail Merican;

(x) Dato' Ir. Hj. Ahmad Zaidee Laidin;

(xi) Ir. Dr. Ting Wen Hui;

(xii) Ir. Daniel Wong Kah Kap.

All the abovenamed 12 members found the Applicant guilty of 4 of the 5 charges brought against him. These 12 members also agreed that the Applicant should be deregistered as a professional engineer as a consequence of being found guilty of 4 of the charges brought against him. Although the Board was aware that deregistration would have serious consequences on the Applicant's livelihood, the Board found that deregistration was nevertheless justified in the Applicant's case as his professional misconduct contributed to the collapse of a building structure, resulting in the death of 1 person and injuries to 5 others.

(c) In addition to the 12 persons named above, 3 other members of the Board attended the Board's meeting on 13.7.2000. These 3 members did not make the decision on the charges brought against the Applicant or the decision to deregister him because they did not hear the charges against him on 9.8.1999. These 3 members also did not make the decision to deregister the Applicant. These 3 members of the Board were:

(i) Ir. Abu Bakar Che Man;

(ii) Ir. Kok Soo Chon;

(iii) Encik P. Kasi

These abovementioned 3 members were present at the Board's meeting on 13.7.2000 because matters other than the charges against the Applicant were also discussed at the said meeting;

(d) In addition to the Board members listed in paragraph 6(b) and (c), 2 of the Board's *"ex-officio"* members also attended the Board's meeting on 13.7.2000. These *"ex-officio"* members were the Board's secretary, Ir. Dr. Judin Abdul Karim, and me, in my capacity as the Board's Registrar. However, Ir. Dr. Judin, and I did not make the decision to find the Applicant guilty of 4 of the 5 charges brought against him. Neither did we make the decision to deregister him. The decisions to find the Applicant guilty of the said 4 charges and to deregister him were taken by the 12 members named in paragraph 6(b);

(e) After the Board made the decision to deregister the Applicant it had to take steps to gazette the decision before it could be made effective. On 13.7.2000 the president of the Board, Dato Haji Zaini bin Omar, ordered the decision to deregister the Applicant to be gazetted. On 19.7.2000 the Board sent copies of gazette notifications in Bahasa Malaysia and English, ordering the deregistration of the Applicant ("the said gazette notifications") to the Senior Federal Counsel of the Ministry of Works to be vetted and checked.

On 27.7.2000 the Senior Federal Counsel of the Ministry of Works returned the approved copies of the said gazette notifications for the signature of the Board's president. On 2.8.2000 the Board's president signed the approved copies of the said gazette notifications. On the same date the said gazette notifications were sent back to the Senior Federal Counsel of the Ministry of Works to be gazetted. Copies of the Board's letters dated 19.7.2000 and 2.8.2000 and the Ministry of Works' letter dated 27.2.2000 referred to herein are annexed to this affidavit as Exhibit "AMY-2";

(f) The said gazette notifications were formally published in the government gazette on 12.8.2000. A copy of the said gazette notifications as they appeared in the government gazette are annexed to this affidavit as Exhibit "AMY-3";

(g) The Board did reply to the Applicant's solicitors' letter of 3.10.2000 by a letter dated 20.11.2000. A copy of this letter is annexed to the Applicant's further affidavit as Exhibit "LPK-16".

(h) Although the Applicant was only informed of his deregistration by the Board's letter of 9.10.2000, he was only required to comply with the Board's decision to deregister him after he was officially informed of the Board's decision.

7. In answer to paragraph 11 of the Applicant's affidavit, I wish to state that I am advised by the Board's solicitors and verily believe that the fact that the applicant has filed an appeal against the Board's decision does not prevent this Honourable Court from dismissing or staying the present application on the ground that the Applicant can seek adequate relief pursuant to his appeal against the Board's decision for the alleged grievances that he claims to have suffered. Furthermore, I am also advised by the Board's solicitors and verily believe that the Applicant's actions in filing an appeal against the Board's decision pursuant to the Registration of Engineers Act 1967 ("the Act") shows that the Applicant has elected to pursue its alleged rights through the appeal procedure provided by the Act. The Applicant ought not now to be allowed to make an application for judicial review with regard to the same issues that can be raised in its appeal.

8. I disagree with paragraph 12 of the Applicant's affidavit. The members of the Board who heard the charges against the Applicant on 9.8.1999 and made the decision to deregister him on 13.7.2000 were properly constituted and empowered under the Act. The decision to deregister the Applicant was made on 13.7.2000, well before the term of office of the then members of the Board expired on 22.8.2000. The Board's decision to deregister the Applicant (made on 13.7.2000) was merely conveyed to the Applicant on 9.10.2000 by me in my capacity as the Board's Registrar (see Exhibit "LPK-8" to the Applicant's affidavit). My appointment as the Board's Registrar was valid as at 9.10.2000. My term as the Board's Registrar only expires on 31.5.2001.

9. I disagree with paragraph 13 of the Applicant's affidavit. Dr. Ir. Judin bin Abdul Karim did not make the decision to deregister the Applicant on 13.7.2000. Dato' Ir. Hj. Ahmad Zaidee Laidin was present at the disciplinary proceedings against the Applicant on 9.8,1999 and was, therefore, entitled to be a party to the Board's decision of 13.7.2000 on the charges brought against the Applicant.

10. I disagree with paragraph 14 of the Applicant's affidavit. I am advised by the Board's solicitors and verily believe that the Board is not a court of law and is not bound by the strict rules of civil or criminal procedure or the rules of evidence. I recognise that the Board must, however, give an engineer a fair opportunity to defend any charges brought against him. In the present case the Applicant was heard personally and through counsel at the hearing on 9.8.1999. Furthermore, the Applicant's witnesses were also heard. The Applicant was not prevented from presenting his defence as comprehensively as he wished.

11. In further answer to paragraph 14 of the Applicant's affidavit, I wish to state that the Applicant's solicitors did not raise any complaint at the hearing on 9.8.1999 or in their subsequent written submissions that the procedure adopted by the Board made it difficult for the Applicant to fairly present his defence against the charges brought against him.

12. I also wish to say in reply to paragraph 14 of the Applicant's affidavit that the Board accepted that a very high standard of proof had to be met before the Applicant could be found guilty on any of the charges brought against him. This point is emphasized in the Board's grounds of decision (see Exhibit "LPK-17" to the Applicant's further affidavit). The Board found that this standard of proof had been fulfilled in the Applicant's case.

13. In answer to paragraphs 15 and 16 of the Applicant's affidavit I wish to state that the Board's function under the Act is to (among other things) regulate the ethics and professional conduct of members of the engineering profession. To this end the Board is given powers to conduct investigations into the professional conduct of engineers under the Act and the regulations made thereunder. Pursuant to its powers of investigation the Board is entitled to ask questions of witnesses at disciplinary hearings is investigatory in nature. It is not adversarial or inquisitorial as claimed in paragraph 15 of the Applicant's affidavit. Pursuant to the Board's investigatory function, the Board is not required to call witnesses to prove a case against an errant engineer. The Board's function is to determine if on the undisputed or proved facts available to it at a disciplinary hearing it can be shown that an engineer has breached his professional duty.

14. In the Applicant's case I wish to state that the Board's grounds of decision were based solely on undisputed facts or facts that were disclosed by the Applicant and his witnesses at the hearing on 9.8.1999 (see Exhibit "LPK-17" to the Applicant's further affidavit).

15. In answer to paragraphs 17, 18, 19 and 21 of the Applicant's affidavit I wish to say that the Board's Ad-Hoc Committee merely makes recommendations to the Board on the action to be taken against an errant engineer. The Board is not bound to accept the Ad Hoc Committee's recommendations. The Board has a discretion to decide whether to accept, reject alter or add to any charges recommended by the Ad Hoc Committee. In the Applicant's case the Board was of the view that the investigations of the Ad Hoc Committee justified the additional charges that were finally brought against the Applicant.

15A. In answer to paragraph 20 of the Applicant's affidavit I wish to state that the fact that the Majlis Perbandaran Shah Alam ("MPSA") did not bring charges against the Applicant for breach of the Selangor Uniform Building By-Laws 1986 has no bearing on the validity of the charges brought by the Board against the Applicant.

16. In answer to paragraphs 22, 23, 24, 25, 26, 27 and of the Applicant's affidavit I wish to state that the Board accepted that the MPSA did not lodge a complaint against the Applicant. However, the Board was of the view that it nevertheless had the statutory powers under the Act to determine if the Applicant had acted unprofessionally. Before the Board conclusively made a finding on the issue of whether it could act without a complaint from a complainant, it gave the Applicant's counsel a further opportunity to make submissions on this point. This is why the Board's letter of 12.5.2000 (Exhibit "LPK-13" to the Applicant's affidavit) was sent to the Applicant's solicitors. The Applicant's solicitors did put farther submissions to the Board on this point (Exhibit "LPK-14" to the Applicant's affidavit). However, the Board did not agree with these submissions and concluded that it could still bring charges against the Applicant for breaches of professional conduct despite the absence of a complaint from MPSA.

17. I also wish to state that the Board's statutory powers to regulate the engineering profession should not be interpreted narrowly to mean that the Board can only conduct an investigation into the conduct of an errant engineer if there

is a complaint against the engineer concerned. Such an interpretation would defeat the purpose and intention of the Act. I would like to refer to the Highland Towers tragedy in the present context. No formal complaint was lodged with the Board with regard to the question whether any engineer had acted in breach of his professional duty and thereby contributed to this tragedy. The Board nevertheless was of the view that it could conduct investigations into this matter.

18. In answer to paragraphs 28 and 29 of the Applicant's affidavit I wish to state that:

(a) the Board made no presumption of guilt against the Applicant;

(b) the Board, in fact, expressly made clear in its grounds of decision that it agreed that a very high degree of proof was needed before the Applicant could be found guilty of the charges brought against him. The Board also pointed out that the Applicant had to be given the benefit of the doubt of any ambiguity in the evidence (see Exhibit "LPK-17" to the Applicant's affidavit);

(c) the evidence that in fact convinced the Board that the Applicant was guilty of 4 of the charges brought against him was the evidence of the Applicant's own principal witness. Professor Thien Cheong Ang.

19. In answer to paragraph 30 of the Applicant's affidavit I wish to state that:

(a) firstly, it was open to the Applicant to ask the Board for particulars of the charges brought against him. He did not do so and, therefore, cannot now claim that the Board failed to explain the issue of public interest to him;

(b) secondly, it was open to the Applicant's solicitors to make a legal submission on the meaning of public interest. They failed to do so. The Applicant, therefore, cannot complain that the Board failed to give him a fair hearing;

(c) thirdly, the Applicant's case was a clear case where the public interest was involved. As a result of the Applicant's professional lapses, a linkway bridge, connecting two buildings, collapsed resulting in the death of 1 person and causing injury to 5 others. It is clearly in the public interest that engineers should be required to act professionally so that they do not cause harm to others in the course of their work.

20. In answer to paragraphs 31 and 32 of the Applicant's affidavit I wish to state that the Board did reply to the Applicant's solicitors letter of 30.10.2000. The Board's reply is exhibited to the Applicant's further affidavit as Exhibit "LPK-16". In its reply the Board pointed out that the further "evidence" dated 25.3.2000 was submitted by the Applicant's solicitors. This is in fact a reference to the Applicant's solicitors' further submission (annexed to the Applicant's affidavit as Exhibit "LPK-14") together with supporting authorities.

21. In answer to paragraphs 33 to 36 of the Applicant's affidavit, I wish to state that:

(a) the Applicant and his solicitors could have determined for themselves from the Technical Sub-committee's report that Ir. Dr. Judin bin Abdul Karim ("Ir. Dr. Judin") assisted in the preparation of the said report. This report was provided by the Board to the Applicant's solicitors well before the hearing of the charges against the Applicant on 9.8.1999;

(b) if the Applicant felt that Ir. Dr. Judin's presence at the hearing of the charges against him would prejudice him, he could have asked that Ir. Dr. Judin be excluded from the said proceedings. He failed to do so and in fact agreed that Ir. Dr. Judin could question his principal witness, Professor Ang Thien Cheong;

(c) at no time during the course of Ir. Dr. Judin's questioning of Professor Ang Thien Cheong did the Applicant or his solicitors suggest that Ir. Dr. Judin's line or method of questioning was inappropriate;

(d) in any event, Ir. Dr. Judin was not one of the persons who made the decision on the charges against the Applicant. Furthermore, Ir. Dr. Judin's views were not the basis of the Board's findings. The Board relied primarily on Professor Ang Thien Cheong's evidence in concluding that the Applicant had not acted professionally. Professor Ang Thien Cheong was the Applicant's witness.

22. In answer to paragraphs 37 and 38 of the Applicant's affidavit I wish to state that:

(a) the Applicant and his solicitors never objected to the presence of the Board's legal advisor, Encik Yatiswara Ramachandran, at the hearing of the charges against the Applicant;

(b) the Board is entitled to have a legal advisor to advise it on issues of law to ensure that the Board's procedures are fair and in accordance with the requirements of the law. The legal advice provided to the Board by its legal advisor is protected by legal professional privilege and need not be divulged to the Applicant. However, I wish to state that the Board did give the Applicant's solicitors a chance to address the Board on the most important piece of advice given to it by its legal advisor. This was the legal advisor's advice that the Board could proceed to investigate the Applicant's conduct despite the absence of a complaint from MPSA (see paragraph 16);

(c) furthermore, I wish to state that the Board's legal advisor merely advised the Board on questions of law. The ultimate decision to find the Applicant guilty on 4 charges and the decision to deregister him were the Board's alone.

23. In answer to paragraph 39 of the Applicant's affidavit I repeat paragraphs 6 and 8 herein.

24. In answer to paragraphs 40 and 43 of the Applicant's affidavit I wish to state that the Board observed the rules of natural justice and procedural fairness in the disciplinary proceedings against the Applicant.

25. I wish to state that the Board has no knowledge of the matters in paragraphs 41 and 42 of the Applicant's affidavit and paragraph 10 of the Applicant's further affidavit. In any event these matters can have no bearing on the legality of the proceedings against the Applicant. I wish to state that I am advised by the Board's solicitors and verily believe that the Applicant has no cause of action against the Board for his alleged loss of revenue following his deregistration.

26. In answer to paragraphs 4, 7 and 8 of the Applicant's further affidavit I wish to state that the Board's letter of 11.12.2000 wrongly stated that the decision to deregister the Applicant was made on 11.4.2000. On 11.4.2000 the Board met to discuss the Applicant's case and decided to send the Applicant's solicitors its letter of 12.5.2000 to ask the Applicant's solicitors for further submissions (Exhibit "LPK-13" to the Applicant's affidavit). No decision on the Applicant's case was made on 11.4.2000. After the Applicant's solicitors made their further submission dated 23.5.2000, (Exhibit LPK-14" to the Applicant's affidavit), the

A Board met on 13.7.2000 to make a decision on the Applicant's case in the manner stated in paragraph 6 herein. Hence, the Board's decision was made after receipt of all the Applicant's solicitors' written submissions.

B 27. In answer to paragraph 6 of the Applicant's further affidavit I wish to state that there are 15 members of the Board, including the president. There were 14 members of the Board who heard the evidence in the proceedings against the Applicant on 9.8.1999. 12 of these members made the decision in the Applicant's case on 13.7.2000. These 12 C persons are named in paragraph 6(b) of this affidavit. This met with the Board's quorum requirement, Ir. Dr. Judin and I also attended the proceedings against the Applicant on 9.8.1999 as the Board's *"ex officio"* members. However, as stated in paragraph 6(d), we did not make the decision on the Applicant's case on 13.7.2000.

D 28. In answer to paragraph 9 of the Applicant's further affidavit I wish to state that the notification of the Applicant's deregistration was gazetted on 12.8.2000. The decision to deregister the Applicant was made before that date, on 13.7.2000.

E 29. For the reasons set out in this affidavit, I humbly pray that the Applicant's application be dismissed with costs.

[7] On 11 April 2001, the applicant affirmed an affidavit in reply F to the affidavit of the respondent and, *inter alia*, it is stated:

2. I crave leave of this Honourable Court to refer to Notice of Judicial Review dated 19/3/2001, Statement Pursuant to Order 53 Rule 3(2) Rules of the High Court (Amendment) 2000 dated 17/11/2000, Affidavit of Leong Pui Kun affirmed G on 17/11/2000 (hereinafter referred to as "the first Affidavit") and Further Affidavit of Leong Pui Kun affirmed on 15/12/2000 (hereinafter referred to as "further Affidavit") and to the Affidavit of Ashari bin Mohd Yakub affirmed on 4/4/2001 (hereinafter referred to as "the Respondent's Affidavit") and filed herein.

H 3. I verily state that I do not intend to deal with matters of law, opinion or inference stated in the Respondent's Affidavit which would be more appropriately addressed by the Applicant's counsel at the Hearing and as such, it should not be assumed that my failure, if any, to address any issues I specifically shall be taken as an admission of the same.

4. I wish to state that I am surprised at the total lack of candour on the part of the Respondent in its reply to my first Affidavit and to my further Affidavit.

5. I crave leave to refer to paragraph 7 of the Respondent's Affidavit and I am advised by my solicitors and verily believe that I am not prevented from seeking judicial review from the High Court 1 by exercising my right to appeal against the Boards decision as stated in the Registration of Engineers Act 1967 as *inter alia* my present application for judicial review is to review the jurisdiction and the decision making process of the Board and does not make reference to the merit of the case. Further, I have qualified my notice of appeal to be without prejudice to my rights to seek recourse from the Court. (See Exhibit "LPK-11" of my first Affidavit).

6. I further wish to state that in any event, to-date, the Appeal Board of the Board of Engineers has not taken any action regarding my notice of appeal dated 27/10/2000 which I had I given to the Appeal Board on 27/10/2000. It has been nearly six months since and the inaction has affected my livelihood.

7. I wish to re-iterate paragraph 13(a) of my first Affidavit filed herein and further state that on the hearing on 9/8/1999 Dato' Ir. Hj. Ahmad Zaidee Laidin left the hearing before lunch on the said date and did not return to attend the remainder of the hearing which lasted until late afternoon on the same day. In such event I verily believe that he should have forfeited his right to participate in further meetings to deliberate on matter as the evidence which the Board purportedly relied upon as stated in paragraph 18(c) of the Respondent's Affidavit was that of one Professor Ang Thien Cheong who had given evidence in the afternoon. Furthermore Dato' Ir. Hj. Ahmad Zaidee Laidin did not attend the deliberations on 11/4/202000.

8. I verily wish to state that the Respondent in its reply to this issue merely states in paragraph 9 of the Respondent's Affidavit that Dato' Ir. Haji Ahmad Zaidee Laidin was present at the disciplinary proceedings and therefore entitled to be a party to the Board's alleged decision on 13/7/2000 without so much as to deny or to admit as to the fact of his absence during the part of the hearing, clearly indicates that the Board is biased and oblivious to the principles of natural justice.

A

9. I wish to reiterate paragraphs 33, 34, 35 and 36 of my first Affidavit and further state that the said Ir. Dr. Judin bin Abdul Karim referred to was not only present but had wrongfully participated in the deliberations on 11/4/2000 and 13/7/2000 and the Board should not hide behind the statement that Ir. Dr. Judin bin Abdul Karim was not one of the persons making the decision, as it would have been extremely likely that he would have influenced the Board members. The Board should categorically deny Ir. Dr. Judin bin Abdul Karim's participation if such had not been the case.

B

C

10. I refer to paragraphs 26 and 27 of the Respondent's Affidavit and verily state that the Tribunal had failed to meet with the quorum requirement as set out by Section 15(2) of the Registration of Engineers Act 1967 ie. 2/3 of the total numbers of the Board present (minimum 12 members). I verily state that on the 9/8/1999 which is the date of hearing and at all material times the total number of the gazetted members of the Board are 17 and not 15 as alleged in paragraph 27 of the Respondents Affidavit and as such the quorum required is at least 12 members. I annex herewith a copy of the list of the Board Members as issued by the Board of Engineers Malaysia and marked as Exhibit "LPK-I".

D

E

11. I now set out hereunder a table showing the attendance of the members of the Board who attended the hearing and the deliberations leading to the decision. (See the list at page 357 of the Appeal Record).

F

12. I crave leave to refer to the above table and wish to state that it can be clearly seen that only 9 members of the Board (No. 2 to No. 10) fully attended the hearing on 9/8/99 and the deliberations on 11/4/2000 and 13/7/2000 which resulted in the decision to deregister me which falls short of the quorum (12 members).

G

13. I refer to paragraph 6(c) of the Respondent's Affidavit, and verily state that the 3 other members of the Board namely, Ir. Abu Bakar Che Man, Ir. Kok Soo Choon and En. P. Kasi, should not have been present on the 13/7/2000 during the deliberation of my charges, and further wish to state that Ir. Abu Bakar Che Man and Ir. Kok Soo Choon were also present on the meeting of 11/4/2000.

H

I

14. I refer to paragraph 6(e) to (h) of the Respondent's Affidavit and verily state that the averments therein confirm that the Board had illegally gazetted my de-registration prior to the issuance of the Order dated 9/10/2000. I verily state that it is not open for the Board to state that I was only required to comply with the Board's decision to de-register me after I was "officially informed" of the Board's decision as:

    (a) the order dated 9/10/2000 is clearly stated to be an order of the Board which had specifically sets out that I have 21 days to appeal against the said order; and

    (b) the gazette serves as a publication to the world at large.

15. I wish further to inform the Court that I had on 6/4/2001 received a letter from the Board dated 21/3/2001 out of the blue informing me that the Board received my application to cancel my registration with the Board. A copy of the letter dated 21/3/2001 marked Exhibit "PKL-2" is annexed herewith. I verily believe that the Board is entirely confused as to whether they have ordered my deregistration on 9/10/2000 or whether I had applied for cancellation of my registration with the Board as alleged by them, and I have accordingly requested for an explanation *vide* my letter dated 9/4/2001. A copy of the said letter marked as Exhibit "PKL-3" is annexed herewith.

16. I crave leave to refer to paragraph 26 of the Respondent's Affidavit and wish to state that the Board is clearly not acting *'bona fide'* in stating that the Board had wrongly stated that the date of its decision to deregister myself was on 13/7/2000 and not 11/4/2000.

17. I verily state that my solicitor's letters to the Board dated 30/10/2000 and 1/12/2000 were specific and the Board's reply giving the date of 11/4/2000 came after my solicitor's demanded that the Board answer the question specifically as to when and who made the decision, (see Exhibits "LPK-9" and "LPK-18" of my first Affidavit).

18. I verily wish to state that the Board's averment that the decision was made only on 13/7/2000 is incorrect and only came about as a result of the issues raised in my first Affidavit and further Affidavit as to the quorum and the non consideration of my further submissions on the issue *inter alia* the identity and absence of a complainant at the hearing.

19. I verily believe that the Board had already made up its mind on 11/4/2000 and the meeting on the 13/7/2000 was "merely" to confirm their earlier decision pending receipt of their lawyer's opinion on the issue of the "complainant".

20. I refer to paragraph 22 of the Respondent's Affidavit and wish to point out it is not the presence of the Respondent's lawyer at the hearing that is being objected to but to his presence during the deliberations leading to the decision.

21. I am advised by my solicitors and verily believe that the reference in paragraph 13 of the Respondent's Affidavit as to the Board's function at the disciplinary hearing being investigatory in nature is a clear statement that they had failed to appreciate that the Registration of Engineer's Act 1967 envisages that a due hearing be given and that the Federal Constitution by virtue of Articles 5(1) and 8(1) demands that there should be procedural fairness throughout where a person's livelihood is involved.

22. I refer to paragraph 11 of the Respondent's Affidavit and wish to state that my counsel had raised the issue as to the procedure to be adopted at the hearing but the Chairman did not clarify the procedure save to simply say that it was quite an informal procedure but formal in finding (see 003 transcript exhibit "LPK-7" of my first Affidavit).

23. I am advised by my solicitors and verily believe that the averments by the Respondent elsewhere in the Respondent's Affidavit supports my statement that the Board is totally at sea with regards to the principles of natural justice and procedural fairness in depriving me of my livelihood. Further, I wish to state that the Board's averments as to the high standard of proof required, the high degree of proof required, that the Board had made no presumption of guilt against me, and that I had the benefit of the doubt of any ambiguity in the evidence is not borne out by the way the hearing and the deliberations were conducted leading to the decision and the embodiment of the same in its written decision does not conform with the reality.

24. I crave leave to refer to paragraph 25 of the Respondent's Affidavit and state that my losses are directly connected to my de-registration and further wish to state that based on my income tax returns as set out in Exhibit "LPK-20" of my further Affidavit I have since been suffering continuous losses of salary and profit as referred to in paragraph 10 of my further Affidavit.

25. I have addressed all the issues that I have been advised by the Applicant's solicitors and relevant to the present application. However, my failure, if any, to address any issues specifically shall not be taken as an admission of the same. Unless specifically admitted, all assertions by the Respondent in the Respondent's Affidavit are denied.

[8] Since this is a trial by affidavits, the respondent on 24 May 2001 affirmed another affidavit in reply where, *inter alia*, it is stated:

3. I crave leave of the court to reply to the Affidavit in Reply by Mr. Leong Pui Kun affirmed on 11.4.2001 ("Applicant's Affidavit in Reply") in order to confirm or deny certain facts and allegations by the Applicant in the Applicant's Affidavit in Reply. I was advised and verily believe that any matters relating to law, opinion or inference would only be submitted at trial, and the Respondent reserves its right to submit on the said matters.

4. I strongly deny the bare statement regarding the Respondent's lack of candour in its conduct "that was made by the Applicant in paragraph 4 Applicant's Affidavit in Reply ("AAR") and require the Respondent to prove his allegation.

5. With reference to paragraph 6 AAR, I was advised and verily believe that the Board of Appeal of the Board of Engineers is a separate body and does not involve the Board of Engineers. For the information of this honourable court, I have been informed and verily believe that the Appeal Board members are in the process of appointment.

6. With reference to paragraph 7 AAR, I was advised and verily believe that the Applicant's belief concerning the forfeiture of Dato' Ir. Hj Ahmad Zaidee Laidin's right to take part in the deliberation of the matter concerned is not correct, and the Respondent reserves its right to submit on this matter during the hearing later.

7. Further, I state that the Applicant himself has amended Transcript Notes of the Hearing and sent the same with cassette recording to the Respondent *vide* solicitors' letter dated 1.10.1999. (Please refer to Exhibit "LPK-7" in the Affidavit Leong Pui Kun affirmed on 17.11.2000.) I state that the Board members were given full and unlimited access to the Respondent's documents were free to refer to the Transcript Notes and the cassette recording at all material times.

8. Subsequent from that, paragraph 8 AAR is strongly denied. I state that the members of the Board are not biased as stated, and the Applicant is put to strict proof of his allegation by the Respondent.

9. I strongly deny the Applicant's allegations, which are unreasonable and without basis in paragraph 9 AAR. I was advised by solicitors and verily believe that the Respondent is not obliged under the law to "strongly deny the taking part" of Ir. Dr. Judin bin Abdul Karim.

10. Concerning the members of the Board, for the honourable court's information, the members of the Board are appointed individually, in accordance with the provisions of the Registration of Engineers Act 1967 (Act 138) ("the said Act"). In my knowledge, following the Board's practice, the terms of appointment for each Board member was different, subject to the limit in the said Act. I state that the total number of members gazetted as members of the Board was 17 at all material times, including on the dates of 9.8.1999, 11.4.2000 and 13.7.2000, although there were changes concerning the Board members. For further information of this honourable court, the changes in the Board members at the material time were as follows:

(a) The members whose terms of appointment ended on 22.8.1999 were Y.B. Tan Sri Ir. Hj. Omar bin Ibrahim and Dato' Ir. Chua Soon Poh; and

(b) Members whose terms of appointment commenced on 22.8.1999 were Ir. Abu Bakar Che Man and Ir. Kok Soo Choon.

11. Following thereon, I humbly apologise to this honourable court concerning the confusion on the total number of Board members stated in paragraph 4 of my affidavit affirmed on 4.4.2001, this mistake was unintentional. I confirm that the Board members list in Exhibit "PKL-1" of AAR is true. Nevertheless, the Respondent does not agree with the Applicant's submission in paragraph 10 AAR and reserves its right to reply to the submission of the Applicant relating to the quorum requirement in the said Act during the hearing later.

12. With reference to paragraph 11 AAR, I state that compared to the Respondent's records, the list of attendance stated by the Applicant in his table is correct except in the following matters:

(a) Ir. Abu Bakar Che Man, Ir. Kok Soo Choon and Mr. P. Kasi are all members of the Board; and

(b) Mr. Yatiswara Ramachandran was not present at the meeting on 13.7.2000.

For the honourable court's information, I as registrar of the Respondent also present at the meetings on all three dates concerned.

13. Nevertheless, I am advised by solicitors and verily believe that the submissions by the Applicant in paragraphs 12 and 13 AAR are not true or are not supported under the law, and the Respondent reserves its right to reply thereto. For the information of this honourable court, there were 14 members of the Board present on 9.8.1999, 13 members of the Board present on 11.4.2000 and 15 members of the Board present on 13.7.2000.

14. I am advised by the Respondent's solicitors and state that the Applicant's submission in paragraph 14 AAR are not correct in view that the Board's order was made on 13.7.2000, and the Respondent's letter dated 9.10.2000 was only notice to the Applicant. I strongly deny any conduct "wrongful in law" and state that the Respondent had acted in accordance with the requirement of the said Act.

15. For the information of this honourable court, the Respondent's letter mentioned in paragraph 15 AAR was only meant to respond to the Applicant's own letter of 30.11.2000, and the Respondent has accordingly replied the Applicant's letter of 9.4.2001 *vide* the Respondent's letter of 23.4.2001. A copy each of the Applicant and the Respondent's letters mentioned are attached herewith and marked as Exhibit "AMY-4" and "AMY-5".

16. The Applicant's allegations that the Respondent clearly acted not *bona fide* in paragraph 16 AAR and the Applicant's allegations and connotation in paragraphs 17 to 19 AAR are all strongly denied, and the Applicant is put to strict proof of the same by the Respondent. I humbly apologise to the honourable court concerning the Respondent's unintentional mistake concerning the dates, and I state that it does not proffer the meaning submitted by the Applicant. Further, I state that from the Respondent's records, the decision relating to the wrongdoing of the Applicant or the charges against the Applicant with the decision to cancel the registration of the Applicant were made by the Board during the meeting on 13.7.2000. Therefore, the submissions of the Applicant in paragraphs 16 to 19 are unreasonable and without any basis.

17. With reference to paragraph 20 AAR, I state that the involvement of the Respondent's solicitor has been explained in paragraph 22 of my affidavit affirmed on 4.4.2001 and was limited. Notice was given to the Applicant concerning the issue of the powers of the Board vide the Respondent's letter dated 12.5.2000 and opportunity to respond was also given, and thereafter, further submissions from the Applicant regarding the issues on the Board's powers and on the need of the complainant or complaint was taken into account by the Board before reaching its decision.

18. The allegations and submissions of the Applicant in paragraphs 21, 22 and 23 AAR are denied, and the Respondent reserves the right to reply during the hearing in future.

19. Paragraph 24 AAR is denied and the Applicant is put to proof of his alleged losses (which are denied).

[9] The last affidavit filed was the affidavit affirmed by the applicant on 1 June 2001 whereby, *inter alia*, it is stated as follows:

2. I crave leave of this Honourable Court to refer to Notice of Judicial Review dated 19/3/2001, Statement Pursuant to Order 53 Rule 3(2) Rules of the High Court (Amendment) 2000 dated 17/11/2000, Affidavit of Leong Pui Kun affirmed on 17/11/2000 (hereinafter referred to as "the first Affidavit") and Further Affidavit of Leong Pui Kun affirmed on 15/12/2000 (hereinafter referred to as "further Affidavit") and the Affidavit in Reply of Leong Pui Kun affirmed on 11/4/2001 (hereinafter referred to as "My affidavit in reply") and to the Affidavit of Ashari Bin Mohd Yakub affirmed on 4/4/2001 and filed herein (hereinafter referred to as "the Respondent's Affidavit") and the Affidavit in Reply of Ashari Bin Mohd Yakub affirmed on 24/5/2001 and filed herein (hereinafter referred to as "the Respondent's Reply).

3. I crave leave of this Honourable Court to refer to paragraph 4 of the Respondent's Reply and reiterate that there was a total lack of candour on the part of the Respondent in his reply to my first Affidavit and to my further Affidavit and repeat the same in respect of the Respondent's reply and will show the same through my submissions.

4. I refer to paragraph 6 of the Respondent's reply and I wish to emphasise that the Respondent had not denied that Date' Ir. Hj. Ahmad Zaidee Laidin had left the hearing before lunch on the Hearing date of 9/8/1999 and did not return to attend the remainder of the hearing which lasted until late afternoon on the same day.

5. I further crave leave to refer paragraph 9 of the Respondent's reply wherein it is stated that the Respondent is not obliged under the law to "strongly deny the taking part" of Ir. Dr. Judin bin Abdul Karim and I am advised by my solicitors and verily believe that the Respondent is under an obligation to this Honourable Court to state the truth ie. whether the said Mr. Dr. Judin bin Abdul Karim did participate during the deliberations on 9/8/1999, 11/4/2000 and 13/7/2000.

6. I wish to reiterate that the Respondent had not even denied until today that Ir. Dr. Judin bin Abdul Karim had not taken part in the deliberations at all let alone having "strongly denied taking part".

7. It is the failure of the Respondent to come clean on Dato' Ir. Hj. Ahmad Zaidee Laidin's absence for the better part of hearing and Ir. Dr. Judin's wrongful participation as stated aforesaid combined with the Respondent's emphasis on four occasions in paragraphs 6 (d), 9, 21(d) and 27 of the Respondent's Affidavit that Ir. Dr. Judin bin Abdul Karim did not make a decision to deregister the Applicant on 13/7/2000 that illustrates a total lack of candour on the part of the Respondent.

8. I crave leave to refer to paragraph 7 of the Respondent's reply and totally taken aback by the Respondent's statement that the Board members were given full and unlimited access to the Respondent's documents and were free to refer to the Transcript Notes and the cassette recordings at all material times.

9. This would suggest that firstly, the members of Tribunal had referred to or could had referred to documents not in evidence as the Respondent had not submitted any documents as evidence in the hearing.

10. I further state that secondly, if the Respondent is referring to the documents which I had submitted then it is totally unacceptable and contrary to natural justice that my documents including the notes of transcript were not given to each and every Tribunal member but they were instead

only given "full and unlimited access" and that they were further free to do so if they felt like it. This is in particular as my counsel's written submissions had been based on the complete notes of transcript (see exhibit LPK-7 of my first Affidavit).

11. I crave leave to refer to paragraph 10 of the Respondent's reply wherein the Respondent had informed the court that the members of the Board were appointed individually under provision of the Registration of Engineers Act 1967 I also wish to inform this Honourable Court that I verily believe that the members of the board come from different engineering disciplines as well as the allied professions and set out hereunder the relevant details;

(See lists of Board's Members 1998/1999 and 1999/2000 in the affidavit).

12. I crave leave to refer to paragraph 11 of the Respondent's reply in which the Respondent now confirms that the total number of Board members at all material times is 17. I verily believe and state that it is beyond comprehension how the Respondent does not even know its own composition and how that the Respondent were able earlier to positively state that the number of Board members including the President numbered 15 in reply to my challenge as to the failure of the Respondent to meet the 2/3 quorum.

13. I crave leave to refer to paragraph 13 of the Respondent's reply and reiterate paragraphs 12 and 13 of my affidavit in reply and the Respondent's statement as to the numbers of the Board present on 9/8/1999, 11/4/2000 and 13/7/2000 (which include members who were not members of Tribunal ie, those who attended fully the *viva voce* hearing) reinforces the position that the Respondent had failed to distinguish its role as a Tribunal in a disciplinary hearing from its other roles.

14. I further wish to state that the Respondent had now included members of the Board who were not members of the Board namely Ir. Abu Bakar Che Man and Ir. Kok Soo Choon when the hearing was conducted on 9/8/1999 in its attendance list of 11/4/2000 and 13/7/2000. I wish to state that their attendance do not at any way add to the quorum as they were firstly not members of the Board on 9/8/1999 for the term 1998/1999 which expired on 22/8/1999. The recognition that only the old Board's members (ie. 1998/

1999) could partake in the disciplinary action against myself is self evident in the statements by the Chairman during the proceedings which is set out hereinunder:

(See extracts in the affidavit).

15. I further wish to emphasis that they did not participate in the decision making process (as stated by the Respondent in paragraph 6(b) of the Respondent's affidavit) *albeit* they attended the meetings on 11/4/2000 and 13/7/2000.

16. I crave leave to refer to paragraph 15 of the Respondent reply and state that I had replied to the Respondent's letter of 23/4/2001a copy of which as annexed herewith and marked as exhibit "LPK-1" and wish to state that the contents of the Respondent's letter dated 23/4/2001 is totally illogical.

17. I refer to paragraph 16 to 18 of the Respondent's reply and I am advised by my solicitors and verily believe that my averments stand to reason and that at all material times the Respondent had acted *ultra vires* and had failed to comply with the rules of natural justice and/or procedural fairness.

18. I refer to paragraph 19 of the Respondent's Affidavit in Reply and now annex herewith a copy of my EA form for the period ending 31/10/2000 marked as exhibit "LPK-2".

19. I have addressed all the issues that I have been advised by the Applicant's solicitors and relevant to the present application. However, my failure, if any, to address any issues specifically shall not be taken as an admission of the same. Unless specifically admitted, all assertions by the Respondent in the Respondent's reply are denied.

Wherefore I pray for an order in terms of the application filed herein.

[10] The learned judge after hearing the submissions of the parties gave judgment in favour of the applicant. In his lengthy written judgment (about 120 pages) the learned judge made the order as follows:

In the premises I grant order in terms of (a), (b) and cost of the Applicant's application on the grounds that there had been non-compliance with the Engineers Act, 1967 and there had been breaches of natural justice and procedural fairness as well. Submission of damages will be heard on 28th November 2001.

[11] Before us, learned counsel for the respondent submitted that the appeal by the appellant would be on nine principal grounds:

> 1. The learned Judge erred in law and fact in concluding that disciplinary proceedings under the Registration of Engineers Act were required to be adversarial and/or analogous to court procedure, and further, that the Appellant had to prove charges against the engineer beyond reasonable doubt. As such, the learned judge wrongly concluded that there was breach of natural justice and/or procedural fairness by the Appellant in adopting inquisitorial procedure.

[12] The respondent submitted that the learned judge erroneously required the disciplinary proceedings before the respondent statutory disciplinary tribunal to be adversarial in nature and analogous to formal criminal court proceedings. This fundamental error in the learned judge's thinking coloured the learned judge's judgment in many aspects. It is apparent from the grounds of judgment that the learned judge judged the respondent not as laymen but against the high standards of a criminal court. As such, the learned judge erroneously concluded that the respondent was in serious breach of natural justice and/or procedural fairness, *inter alia*:

(i) in adopting investigatory or inquisitorial procedure and in failing to adhere to adversarial procedure;

(ii) in failing to have an independent person act as prosecutor; and

(iii) in failing to call witnesses and to adduce evidence to prove the charges against the applicant before the applicant is required to defend himself.

[13] The learned counsel for the respondent submitted further that the learned judge failed to appreciate that it has been established under common law that the principles of natural justice and/or procedural fairness are to be flexibly applied to a statutory disciplinary tribunal like the respondent. All natural justices require is that the applicant be given a fair opportunity to be heard, and not the best possible justice. The respondent as a disciplinary tribunal is not bound by strict rules which apply to criminal trials. The learned judge failed to appreciate the scheme of the Registration of Engineers Act 1967 ("Act") intends and entitles

the respondent to have flexibility in determining its own procedure for a hearing under s. 15 of the Act. The learned judge failed to appreciate that the scheme of the Act which:

(i) Contemplated the respondent conducting an investigation into the professional conduct of engineers; and

(ii) In the event these investigations show that that a particular engineer's conduct *prima facie* falls short of the requirements under the Act or regulations thereunder the respondent is entitled to require the engineer concerned to explain his conduct to the respondent at a disciplinary hearing, without adducing further evidence.

The respondent went on to say that on the evidence, the applicant was afforded an oral hearing, written submissions and representation by counsel throughout the same. The applicant could not have been deprived of an opportunity to be heard. The applicant had in fact been given a copy of the Technical Sub-Committee Report (containing findings of under-design and lack of supervision by the respondent) as well as the Ad-Hoc Committee Report before the hearing on 9 August 1999. These findings make up a *prima facie* case against the applicant, whereby the applicant had to explain his conduct. The technical findings by the Technical Sub-Committee were undisputed and in fact confirmed by the applicant and/or his expert witness during the hearing of 9 August 1999. There is no requirement in law for the respondent to apply the criminal standard of beyond reasonable doubt in disciplinary proceedings. From the grounds of decision, the applicant in fact applied a high standard of proof. Alternatively, the applicant has waived any right to object to any irregularity in the proceedings. Further, and alternatively, any breach of natural justice does not prejudice the applicant and does not affect the decision made by the respondent as the respondent relied on the undisputed findings of the Technical Investigation Report and the admissions of the applicant as to under-design and lack of supervision by the applicant. It would, therefore, not have made a difference if an adversarial or formal procedure was followed. The learned counsel then cited several text books and cases as authority to support his submission.

In respect of this issue the learned judge in his judgment stated:

> It is the Applicant's case that the Order is *ultra vires* for first non-compliance with the Engineers Act 1967 and also for breach of the rules of natural justice and/or procedural fairness. It should be pointed out at the outset that the Respondent had taken a position that its role in the hearing was "investigatory" and not adversarial or inquisitorial. The Respondent had relied on its interpretation of Sections 4(l)(f) and 15(1) of the Engineers Act 1967 for its "investigatory" position in the hearing. I think this "thinking" is anathema in Malaysian legal jurisprudence let alone contrary to Articles 8(1) and 5(1) of the Federal Constitution and it is this line of "thinking" that has led the Respondent to conduct its hearing contrary to the rules of natural justice and procedural fairness. The Applicant had alleged in his Affidavit that there was a total lack of candour and bias on the part of the Respondent in its conduct and also in its Affidavit-in-Reply and as the Respondent had put the Applicant to strict proof.
>
> Section 15(2) of the Engineers Act 1967 clearly sets out that the Board shall not make any order suspending or cancelling the registration of any engineer unless there has been a hearing at which at least two-thirds of the total number of members of the Board are present. The total number of gazetted members of the Board at the material time is 17 and two-thirds of this would mean a minimum of 12 members. (See paragraphs 10, 11 and 12 of the Applicant's Affidavit (Encl. 8). It is the Applicant's case that the Respondent had not complied with the statutory provision as there were only 9 persons who were qualified to make the decision. These 9 qualified persons are those who had attended the Hearing on 9.8.99 in full and also who had attended the deliberations on 11.4.2000 and 13.7.2000. This is shown by the attendance table set out in paragraph 11 of the Applicant's Affidavit-in-Reply (Encl. 8). The attendance table is not disputed by the Respondent (see paragraph 12 of the Respondent's Affidavit) (Encl. 9). It is noted that the Applicant has accepted that Mr. Yatiswara Ramachandran, the legal advisor, was not present on 13.7.2000. It must be pointed out that whilst a member of the tribunal Dato' Ir. Hj. Ahmad Zaidee Laidin had attended part of the hearing on 9.8.99 in the morning, the Applicant contends that Dato' Ir. Hj. Ahmad Zaidee Laidin had forfeited his right to participate in further deliberations and the decision-making. He had left the hearing before lunch and did not return at all to the hearing which lasted up to the late afternoon and further did not attend the deliberations on 11.4.2000. It must be emphasized that the Respondent had categorically stated that it had relied primarily on the evidence of one Professor Ang Thien Cheong (see paragraphs 18(c) and 21(d) of the Respondent's

Affidavit) (Encl. 6) and the same was given in the absence of Dato' Ir. Hj. Ahmad Zaidee Laidin. The Respondent had put forth an argument that by virtue of section 3(1) of the Act, it is irrelevant as to who among the Board members attended on all 3 days meetings, and it is also irrelevant that a member of the Board, Dato' Ir. Hj. Ahmad Zaidee Laidin left the hearing earlier on 9.8.1999 as it is the Respondent who hears or decides as a body under the Act. In short the composition of the Respondent is "irregardless" as it is not the individual Board members who have been given power to decide under the Act. Taking this argument to the fullest it would then be the Respondent's case that after having gone through the formality of a hearing of at least two-thirds of the Board which decides as a body (corporate sole) and not the individual Board members. I am of the view that section 3(1) of the Act merely establishes the legal status of the Board as a body corporate with perpetual succession and a common seal and which may sue and be sued and it is ludicrous I think to submit that this was what Parliament intended by enacting section 3(1).

The Respondent had submitted that the quorum is 11. The total number of gazetted members of the Board at all material times is 17. The Act clearly stated at least two-thirds must be present. It is simple arithmetic that 2/3 X 17 = 11.33. The qualifying words at least ie, a minimum. Indeed unless one of the members of the Tribunal is one-third more than a normal human being the quorum must be 12. I think the Respondent has no business rounding the quorum down to 11. Quite simply the maxim *verbis legis non est recedendum* applies *viz.* no departure is permitted from words of a statute. ... It must be stressed from the evidence given which is not disputed that only 9 persons were present throughout the 3 dates. That being said the Respondent had clearly not complied with the mandatory quorum of 12.

The Respondent had gone in length under this heading on the procedures and concluded that from the above lengthy procedure, that as a whole and at every material point in time, the Board had given the Applicant a fair opportunity to be heard and submission before an impartial tribunal. I think that nothing could be further from the truth and the Respondent should not be so presumptuous in its submission that there is no dispute as to the procedure as a whole adopted by the Board. The Respondent had resorted to a Latin phrase "expresio unius exclusion alterius" principle to say that since there is no express provision on the number of decision-makers it may be implied that the number of the decision-makers is not limited. I think the lumping of the "decision-makers" together with "hearers" for purposes of the above Latin phrase is as good as comparing apples with oranges.

Taking the Respondent's interpretation to its logical conclusion the number of decision-makers can be zeroed as you do not need any of the persons who heard the matter to make a decision. This being further reinforced by the Respondent's earlier submissions that it was the Respondent as a corporate sole which make decisions. On this point, the important maxim of *"delegate potestas non potest delegari"* comes in mind. Simply put a delegated power cannot be delegated; that is, a delegated power cannot conferred by the delegate upon another. It is trite law that all persons who are entrusted or charged with the performance of judicial functions, whether in the Supreme or Inferior Courts, must perform these duties in person, and cannot delegate their authority to another, except in such cases and to such extent as is expressly authorised by statute or the common law. Parliament had delegated the powers under section 15 of the Act to a quorum of at least 12 members of the Board who sit in a quasi-judicial capacity to determine the fate of the applicant. It did not expressly state anywhere that the authority of this 12 persons can be delegated to another person (let alone to a body corporate who having no eyes and ears must be blind and deaf to justice). On the contrary under item 2(5) of the Schedule, the Board's powers of delegation had been specifically excluded in relation to sections 15 and 26. I am of the opinion that it is totally wrong for the Respondent to state that the Schedule to the Act further provides under Item 2(5) subject to the quorum requirement under 2(3) and the casting vote of the President under 2(4), it is for the Board "to determine its own procedure" and Item 2(5) provide the exception. …

The Respondent had submitted that the paramount consideration in my mind should be whether on the whole of the particular facts and circumstances of this case read in the light of the statutory framework procedural fairness had in fact been meted out to the Applicant. The Respondent had also submitted that in considering whether procedural fairness has been satisfied on the totality of the particular facts and circumstances of this case, the Board must be judged as laymen and not as if they were an extension or part of the Court. On the point that the Board must be judged as laymen, I must remind myself of the fact that the Board had been legally advised throughout and moreover they are not laymen but professional men. They are all professional engineers. The Board's legal advisor had attended the hearing on 9.8.1999.The Respondent had not denied that the Board's legal advisor had earlier been involved in the preparation of the prosecution against the Applicant (see para 37 Encl. 5) and that the Board had also received legal advice after the hearing albeit without disclosure of what this was to the Applicant (see para 38 Encl. 5). As the

Respondent had asked that they be judged as laymen I had been made aware that the Chairman of the Board, Dato' Ir. Hj. Zaini Omar also holds legal qualifications. The Respondent has repeatedly emphasize that they had at every pointing time complied with the rule of natural justice and a procedural fairness and that the Tribunal was impartial. However the facts and the reality of it did not bear this out. It must be pointed out that the Ad-hoc Committee when they interviewed the Applicant did not give a copy of the Technical Committee Report to the Applicant (see exhibit LPK-12 Encl. 5). The Technical Committee Report was only given to the Applicant after the Applicant was charged by the Respondent and even that only after the Applicant's repeated requests (see exhibit LPK-3 Encl. 5). How then could it be said that the Ad-hoc Committee had given the Applicant a fair opportunity to be heard when the Ad-hoc Committee did not even disclose the findings of the Technical Committee Report to the Applicant. The Ad-hoc Committee silence involved a breach of natural justice because it deprived the Applicant of a chance to answer the Ad-hoc Committee on the findings of the technical committee.

A B C D

…

It cannot be correct to say that the Applicant was given a proper opportunity to reply on this issue when the legal representations addressed to the Respondent by their legal advisor was not make known to the Applicant (never mind the fact that they had not disclosed the fact that the legal advisor was present during the meeting of 11.4.2000. It is important to note on this preliminary issue that the Applicant had pointed out that in their Further Submissions (see exhibit LPK-14 Encl. 5) that the Respondent in its letter of 12.5.2000 had *inter alia* put words in the applicant's 'mouth' as the Applicant (then Respondent) had nowhere in pages 3 and 4 of the Applicant's Written Submissions dated 1.10.1999 used the words "no power to conduct a hearing". It is therefore arguable that any legal advice given to the Respondent by the Board's legal advisor subsequent to the Applicant's Further Written Submissions resulting in the decision of 13.7.2000 would not have taken in the Applicant's views on the law as the Applicant had criticized the premise upon which the Respondent had based his letter of 12.5.2000. It is therefore a cogent argument that the legal representations given by the Board's legal advisor should in all fairness be given to the Applicant. At page 29 the Respondent had stated that the Applicant had not explained what was meant by the statement that the function of the Board is adversarial and/or inquisitorial rather than investigatory. This statement had come from the choice of words used by the Respondent in its Affidavit (para 13 Encl. 7) that the function of

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A the Board was investigatory and not adversarial and/or inquisitorial. The Applicant had very clearly in para 15 Encl. 5 of the Applicant's Affidavit clearly stated that in the case of disciplinary hearing under the Malaysian System of Justice the process is an adversarial and not an inquisitorial and that the
B Board had concluded the Hearing in an inquisitorial manner. I am of the opinion that the concept "the Board's function at disciplinary hearings is investigatory in nature" and that "it is not adversarial or inquisitorial" is totally anathema in Malaysian legal jurisprudence and it smacks of powers given only in a police state. In the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan*
C *Pendidikan & Anor* [1996] 1 MLJ 261 in which the Court of Appeal had held that in any hearing involving the issue of misconduct, there must be due observation of procedural fairness, and the said doctrine of procedural fairness emanates from the combined effects of Article 8(1) of the Constitution.

D …

Gopal Sri Ram JCA in that case at page 288 concluded that:

> Life as in Article 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life
E itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society had to offer to its members. It includes the right to live in a reasonably healthy and pollution free
F environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure.

In the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal* [1996] 1 MLJ. Page 481, the Court of Appeal
G held:

> Per Gopal Sri Ram JCA: The current approach to the judicial review of administration powers is that laid down in *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487, namely whether procedural fairness is meted
H out in a particular case. Procedural fairness is part of our law because of the terms of Arts. 5(1) and 8(1) of the Federal Constitution. As a general rule, procedural fairness, which includes the giving of reasons for a decision, must be extended to all cases where a fundamental liberty
I guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker, (see pp. 531C, 532B and 5361).

Indeed, all Acts of Parliament are subject to the Federal Constitution, and it is clearly not open to interpret any statute, the effect of which is to contravene the Constitution. It was wrong for the Respondent to interpret Sections 4(l)(f) and Sections 15 to the extent that their role at the hearing was "investigatory" and not adversarial. It is observed that the Applicant had in their further submissions dated 23.5.2000 highlighted this to the Respondent and had shown from the Hansard that Parliament had pointed out the deficiency of the Registration of Architects Act 1967 which was in *pari materia* with the Registration of Engineers Act 1967 when both Acts were passed in 1967 in amending Section 15 of the Registration of Architects Act, 1967. The Section 15(a) amendment specified the appointment and powers of investigation and disciplinary committees. The Applicant had also drawn comparison of other Acts governing the other professions and categorically stated that it was folly to believe that the engineering profession are governed by different rules when it comes to natural justice and/or procedural fairness. …

The Respondent had failed to point out that the Applicant in filing its Notice of Appeal had clearly made clear to the Respondent that its Appeal was lodged entirely without prejudice to the Applicant's rights to pursue further recourse in the Courts. (See exhibit "LPK-11" Encl. 5). The Applicant had informed the Court of this through his Affidavit-in-Reply (Encl. 8 para. 5). The Federal Court in *Lai Cheng Cheong v. Sowaratnam* [1983] 2 MLJ 113 held that an applicant for *certiorari* is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy nor he need to have exhausted his right of appeal to a court of law. It is trite law that since the Federal Court decision in 1983 that even if there was an appeal provision available to the Applicant the discretion still rest with the Courts to act by way of judicial review where there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice. This has been clearly set out in the Supreme Court case of *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185 by Hashim Yeop A. Sani SCJ at page 189 D after an extensive review on this issue. This case was also followed in the High Court case of *Sabah Berjaya Sdn Bhd v. General of Inland Revenue Department & Anor* [1996] 5 MLJ 366.

Further down in his judgement the learned trial judge stated:

> I am of the opinion that the disciplinary action is governed by the adversarial system of justice and that the principles of natural justice and procedural fairness are to equally apply. It is noted that Section 15 of the Engineers Act

1967 which deals with the powers of the Board of Engineers to order the suspension or cancellation of any engineer clearly states at Section 15(2):

> that the Board shall not make any such order unless:
>
> (a) There has been a hearing at which at least two thirds (2/3) of the total number of members of the Board are present; and
>
> (b) An opportunity of being heard either personally or by counsel has been given to the registered Engineer against whom the Board intends to make the order.

In the case of *Wong Kok Chin v. Singapore Society of Accountants* [1990] 1 MLJ 456 where it was held that at page 458:

> (18) Domestic tribunals such as this committee, which derive their authority from Parliament, usually have a wide discretion to carry out inquiries in accordance with their own rules of procedure. At every stage, however, they must observe what are commonly regarded as rules of natural justice. An offender brought before a tribunal must not only be given a hearing, but he must also be given a fair hearing. Otherwise, the tribunal would be acting *ultra vires*. The adversarial system of justice necessarily means, in the case of a disciplinary committee of a professional body, that it must approach the issues before it with an open mind.

The above case was also cited by me in the case of *Loh Yoon Thong v. Institut Akauntan Malaysia* (Kuala Lumpur High Court Originating Motion No. R2-25-92-1999) wherein I had set aside the finding of the disciplinary committee on the grounds *inter alia* that the manner in which the disciplinary committee went about its inquiry was clearly against the rules of natural justice and therefore *ultra vires*. However, the Respondent on the contrary, in paragraph 13 of the Respondents Affidavit (Encl.7) states that "the Board's function at disciplinary hearings is investigatory in nature" and that "it is not adversarial or inquisitorial". It is this line of thinking which is a clear indictment of the Respondent's failure to distinguish between its earlier role to investigate into any incident and it's later role as a Tribunal that has given rise to the breaches of natural justice and procedural fairness which was clearly in open defiance of Section 15(2) of the Engineers Act 1967

and Articles 5(1) and 8(1) of the Federal Constitution which requires that in any hearing involving the issue of misconduct there must be due observation of procedural fairness (see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at page 288H). Indeed the concept that the Board's function at disciplinary hearings is "investigatory in nature" and that "it is not adversarial or inquisitorial" is totally anathema in Malaysian legal jurisprudence and it smacks of powers given only in a police state. It should be highlighted at the Board in its charge sheet dated 11.11.1998 (see exhibit LPK 1 of Applicant's First Affidavit) (Encl. 5) had clearly stated the following:

> the Board after conducting investigation has decided to hold a hearing under section 15(2) of the Registration of Engineers 1967 where you are required to answer the following charges.

It is therefore a contradiction in terms for the Board now to state that the investigatory process is still in place after having clearly stated that it had already conducted its investigation. In the case of *Tay Eng Chuan v. Professional Engineers' Board* [1982] 1 MLJ 249 wherein Meggary VC in the case of *Mclnnes v. Onslow Fane*, had said at page 250 as follows:

> It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason; and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which in *Ridge v. Baldwin Lord Hodson* said were three features of natural justice which stood out) are plainly apt.

The Board had formally charged the Applicant based on a complaint from the MPSA. (See Exhibit "LPK-1" First Affidavit) (Encl. 5):

> Pursuant to complaint received by the Board of Engineers Malaysia from Majlis Perbandaran Shah Alam regarding collapse of the Linkway Bridge at Matsushita Television Co. Sdn Bhd Shah Alam, the Board has carried out investigation into the matter.

However, it was subsequently established in the proceedings that MPSA had not made any complaint to the Board.

...

The Board has subsequently accepted that there was no complaint made by MPSA but nonetheless maintained that the existence of a complaint from the MPSA was not relevant to the validity of the charges against the Applicant. The Board further stated that (see "LPK13" of Applicant's Affidavit) (Encl. 5).

> The Board has the powers under, inter alia, Sections 4(l)(f) and 15 of the Registration of Engineers Act 1967 to carry out investigation into the professional conduct of engineers to ensure compliance with the Registration of Engineers Act 1967 and the regulation thereunder even in the absence of complaints.

Having adopted the position that the Respondent's role investigatory at a disciplinary hearing it is not surprising that the Respondent made their decision without requiring the presence of a complainant to support the facts of the complaint.The Respondent had led the Applicant on throughout the entire hearing that the complainant was in fact MPSA. To make matters worse, when this was discovered through the Applicant's counsel efforts by examining MPSA's witness the Respondent decided that it could still proceed to make a decision without any evidence being adduced at all from a complainant. Indeed the Board had even stated in its grounds of decision (see paragraph 13 of Exhibit LPK-17 of Applicant's Affidavit) (Encl. 5) that:

> As such, it must be concluded that Section 15 expressly permits a situation where the Board may bring charges against an errant engineer without a formal complaint and cancel or suspend that engineer's registration, if he is found guilty of any of those charges. Although it may appear that the Board is acting as "complainant" and "judge", such a situation is expressly condoned by the registration of Engineers Act 1967.'

The question is simply whether the Respondent sitting as a tribunal had acted beyond its permissible lawful limits by deciding that they were empowered under Section 15 to proceed with making a decision against the Applicant

without producing a complainant at a hearing. This is in particular when the Board had formally charged the Applicant pursuant to a non-existent complaint by the MPSA and that the hearing had proceeded on the assumption that the complainant was MPSA (as insisted upon by the Chairman of the tribunal). The stark reality was that the hearing had proceeded and ended without any complainant. More alarming was that the Applicant never knew what the complaints were as these were never told to him. In the case of *Tuan Hj. Maidin bin Hj. Manap v. Lembaga Jurukur Tanah Semenanjung Malaysia* [2001] 1 AMR page 178, I had stated inter alia:

> If there is a complainant, there must be a complaint. However no formal complaints were ever forwarded to the appellant. There should have been an explicit and definite complaint made to the Board for the Board to have relied on them to institute disciplinary proceedings. Only a charge was forwarded to the appellant as per exhibit "HM-1" in the appellant's affidavit.

Since the Board had seen it fit in its charges to specifically refer to MPSA as the complainant (when such was not the case) its insistence that MPSA was a complainant throughout the proceedings would amount to be a fundamental irregularity. The Board had relied on the fact that there had been a "complaint" but there had not been any complaint. It is by reason of this irregularity that there had been no "due enquiry" and it was not open to the Respondent to simply take the position (see paragraph 9 of the grounds of decision of LPK-17 of the Applicant First Affidavit) (Encl. 5) that:

> This power in Section 4(1) is very broad and clearly grants the Board the power to regulate the engineering profession even without the existence of a complaint from a complainant.

In essence the Respondent had decided to take over the role of the "complainant" after discovering that there was actually no complainant or any complaints made at all after the hearing had ended. It is akin to a judge in the court upon discovering that there was no accuser decides that he will now take over both the rules of accuser and prosecutor. This clearly infringes the cardinal principle that no man shall be a judge in its own cause *(nemo judex in causa sua)*. This principle and the test of personal bias had

A been clearly expressed in the case of *Tuan Hj. Maidin bin Hj. Manap v. Lembaga Jurukur Tanah Semenanjung Malaysia* [2001] 1 AMR page 181 where I had stated:

> It is to be remembered that no rules have been made regarding the procedure to be followed at inquiries held under s. 17. In such a case, I am of the view the Board must do its best to act justly and to reach a decision by just means. "If a statute prescribes the means it must employ them. If it is left without express guidance, it must still act honestly and by honest means". See per Lord Shaw in the case of *Local Government Board v. Arlidge* [1915] AC 120 at p. 132-3. On aspect of the concept of natural justice the principle of *"nemo judax in re sua"* which literally means that a man should not be a judge in his own cause or that an adjudicator must be impartial. The principle that bias disqualifies an individual from acting as an adjudicator flows from the maxims.
>
> (1) A man must not be judge in his own cause;
>
> (2) Not only should justice be done, but it should be seen to be done,
>
> The test of personal bias on the part of the decision-maker is not whether there was actual prejudice against the appellant or not. The courts do not go into the facts of the true case to see whether or not the appellant had been prejudiced in fact. The test is whether there is "real likelihood" of bias in the facts of the case and this had to be ascertained with reference to the "right minded persons".

Section 15(2)(b) clearly spells out that an opportunity of being heard must be given to the registered Engineer against whom the Board intends to make the order. I am of the opinion that the opportunity to be heard would mean that the Applicant had an inalienable fundamental right to question the person who had complained against him as a professional. This proposition is supported by my decision in case of *Loy Yoon Thong v. Institut Akauntan Malaysia* (Kuala Lumpur High Court Originating Motion No. R2-25-92-1999) wherein at page 25 I had stated:

> Under such a state of ignorance as to the ground rules, and expecting that the complainant being the key witness would attend the hearing, the Appellant informed the Disciplinary Committee that he would like to cross-

> examine the complainant who had made a statutory declaration in support of his complainant. The Disciplinary Committee rejected his request, saying that the Appellant had to give appropriate notice if he desired to do so. I think this was wholly without basis and was illogical. This was because the Appellant had an inalienable fundamental right to question the person who had complained against him as a professional. The question was whether the Disciplinary Committee had acted way beyond the permissible lawful limits?

As in the above case, the Applicant were also ignorant of the ground rules as the tribunal had failed to establish any proper procedures at the hearing and were also themselves unclear of its own procedures (see paragraph 14 of Applicant's First Affidavit) (Encl. 5) and the failure of the Respondent to produce a complainant at the hearing and to identify who the complainant actually was, clearly deprived the Applicant of its inalienable fundamental right to question the person who had complained against him. Indeed, even the Emergency (Security Cases) Regulations, 1975 (Escar) which provide the examination of witnesses under special circumstances under Section 19 does not take away the accused's right to cross-examine the witnesses for the prosecution.

It is observed that the Respondent had accepted the charges as proven and the hearing on the 9.8.99 was only a formality and that the Respondent had in fact arrived at a conclusion even before carrying out the said formality. This can be seen from the active role that was assumed by the Chairman of the tribunal in discharging his duty not only as an adjudicator, but also the role as prosecutor. The statements by various other members of the tribunal also show that they were biased. This was clearly seen in the Notes of Evidence where the Chairman attempted his best to seek out the Appellant's weakness. Para *88 Halsbury's Law of England* (4th Edition VI(1)) amongst others, states:

> Likelihood of bias may also because an adjudicator has already indicated partisanship by expressing opinions antagonistic or favourable to the parties before him, or has made his views about the merits of the very issue or issues of a similar nature in such a way as to suggest prejudgment, or because he so actively associated with the institution or conduct the proceedings before him, either in his personal capacity

A or by virtue of his membership of an interested organisation, as to make himself in substance, both judge and jury.

Following the Respondent's recent statement in their Affidavits that its role at a tribunal hearing was investigatory B it now comes as no surprise that the Chairman of the tribunal Y. Bhg. Dato' Ir. Hj. Zaini bin Omar was also the President of the Board of Engineers (see exhibit PKL-2 of Applicant's Affidavit-in-Reply) (Encl. 8) had descended into the arena and joined into the fray (as did some of the other C members). In the case of *Wong Kok Chin v. Singapore Society of Accountants* [1990] 1 MLJ 465 referred to earlier, the Court held that:

In hearing evidence, a disciplinary committee may seek clarification on in the evidence which are not clear, but D in doing so it must at all times avoid descending into the arena, and joining in the fray. An inescapable impression formed from perusing the transcript is that, in trying to discharge its responsibilities effectively, the committee went well beyond its authority to carry out a 'due inquiry' under the Act, until the inquiry became E an inquisition of its own, aimed at securing evidence to justify a finding of guilt. The manner in which the committee went about its inquiry was clearly against the rules of natural justice and therefore *ultra vires*, and on this ground alone any finding and sentence by it would F have been avoided.

I am of the opinion that the various statements made by the Chairman and other members of the tribunal which are reproduced below clearly shows that the manner in which the Respondent went about the hearing was clearly against G the rules of natural justice and therefore ultra vires and its decision void.

[14] The learned judge then cited the relevant passages to highlight what transpired during the hearing of the respondent's H disciplinary proceedings to show that the hearing was against the rules of natural justice. After citing the passages the learned judge then stated:

It is clear from the above that the Chairman and certain members of the tribunal had indicated partisanship by expressing opinions I antagonistic to the applicant before them and has made known their views about the merits of the very issue or issues of a similar nature in such a way as to suggest prejudgment. In the

Chairman's case because he was so actively associated with the Board as its President. Quite clearly the tribunal had not adopted an adversarial system of justice as held by the Court in the case of *Wong Kok Chin v. Singapore Society of Accountants* [1990] 1 MLJ 456. In the case of *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259, per Lord Reward CJ said, "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". In the Applicant's case the members of the tribunal had certainly descended into the arena and joined into the fray and it is the Applicant's case that the likelihood of bias is not just apparent but real. The Respondent has repeatedly submitted that there is no basis for the Applicant's allegation based on the totality of facts. If I were to run through the entire notes of evidence will note that the Chairman was also critical of the local authorities and had expressed his views on what was right and what was wrong. The fact is that based on the totality of facts by a complete perusal there can be no question that there was bias indicated. The Respondent had also said that the opinions were reasonable and do not in any way prove bias or pre-judgment in any manner. I recognize the fact that in application for judicial review, it is not the merits that are being considered but however, having taken cognizance of this, it would not be in the interest of justice no to reply to various points raised by the Respondent in their submissions. At page 47 the Respondent submits that the comment on I.E.M. at page 5 of the Amended Notes is of no relevance to any question of bias. There is no question of bias or prejudgment as it is true that the Board is not bound by what IEM has said. This clearly shows the closed mind of the Board as what was submitted was a letter on the matter of prevailing practice from the Institution of Engineers, Malaysia (I.E.M.) (see page 28 to 34 of Applicant Written Submissions, encl. 5 Exhibit 7) and the fact that there are legal authorities such as *Nye Saunders & Partners (a firm) v. Alan E. Bristow* 37 BLR 97 at page 103 which states:

> Where there is a conflict as to whether he has discharged that duty, the courts approach the matter upon the basis of considering whether there was evidence that at the time a responsible body of architects would have taken the view that the way in which the subject of enquiry had carried out his duties was an appropriate way of carrying out the duty, and would not hold him guilty of negligence merely because there was a body of competent professional opinion which held that he was at fault.

A The I.E.M. is a responsible body for engineers in Malaysia with representatives in the Board itself and the Respondent was bound in law to consider the letter from I.E.M. but the Respondent had instead put themselves on a higher pedestal and this is clearly shown by the remarks from the Chairman at page 5 of the Amended Notes of Evidence:

B

C: Yes. They answer to us, we don't answer to them. That's for sure. We're statutory authority and they are an institution.

C This is followed by the members' remark indicating the Respondent's closed mind.

M: Sorry, Datuk Chairman, the remark made is, I don't see the relevance to bring in I.E.M. at this point because what I.E.M. had clarified is not what our view.

D This clearly shows the bias taken by the Respondent as in the first place, the I.E.M. do not answer to the Board (bearing in kind that the Chairman is also the President of the Board) although some of its members who are registered professional engineers might and secondly it shows the closed mind of the E Respondent. The Respondent submits at page 49 that the statements at page 23 of the Amended Notes clearly shows that the Chairman was willing to accept what said to be true by the Applicant on the issue of the agreement between his company and Kajima. If one was to examine the Chairman's earlier statement of the Amended Notes at page 15:

F

C: … We are taking too long.

And the statements at page 23:

C: We are going to accept the one that is better of him.

G

V: No. We'll take what's the truth, not the better one.

C: We will take the truth. So what is the truth? We accept it and this is not going to be the contentious issue anymore. You point out which one you want to be true then we accept

H it to be true.

The Respondent submits that this remarks are of no significance as at the end of the day the Respondent accepted the Applicant's submission. I think the Respondent has totally missed the point. The statements clearly show the rush of the Chairman to finish

I the case and his total indifference as to the truth regarding the

agreements which the Ad-hoc Committee had formed their opinion. Indeed, if the Respondent had accepted the Applicant's submission why is it that the Respondent keep on insisting that the Ad-hoc Committee had duly looked into the matter. A

I had in *Loh Yoon Thong v. Institut Akauntan Malaysia* (Kuala Lumpur High Court Originating Motion No. R2-25-92-1999) at pages 37-39 cited para. 88 *Halsbury's Law of England* and also the cases of *Wong Kok Chin v. Singapore Society of Accountants* [1990] 1 MLJ 456 and *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 in my decision allowing the appeal setting aside the decision of the Institut Akauntan Malaysia. Looking at the totality of the evidence there was not only real likelihood of bias but also actual bias on the part of the Respondent who can be said to be acting as accuser, judge and executioner in his own cause. B C

The Respondent goes further to submit at page 29 that the charges in the cases of *Loh Yoon Thong*'s case that the facts alleged in the charge for "unprofessional conduct" should be proved beyond reasonable doubt. However, on the facts of the instant case, the Respondent says that it is (*sic*. Merely) for contravention of a regulation *viz*. Regulation 24 and that from the words in Regulation 24 the assessment to be made by the Board under the charges against the Applicant does not involve any element of "moral turpitude" and as such, there is no question of any higher burden to be imposed. I think nothing could be further from the truth. The Respondent's position all the while was that the charges were for not upholding the reputation and standing of the profession. I only need to look at the Chairman said in reply to the Applicant's preliminary objections that it was *ultra vires* for the Board to prosecute on matters relating to the alleged infringements of the Building By-laws when the authorities themselves did not do so. D E F

Further down in his judgment the learned judge stated as follows: G

It is fundamental that wrong is not presumed. The Latin maxim "injuria non praesumitur" sets out the point that just as in criminal matters guilt is never presumed, so in civil cases no one is presumed to have done a wrong or injurious act. It must be proved by him who complains of it. I think the Respondent's submission that it need not adduce any evidence at the hearing as there was no requirement for any form of procedure to be followed, runs contrary to this maxim. This submission also reinforces the Applicant's earlier submissions that the Respondent had not properly laid down the procedures for the Applicant to properly defend himself. H I

The Applicant had in paragraph 14 of the Applicant's First Affidavit (Encl. 5) illustrated how the Respondent had failed to establish any proper procedures of the hearing and how the Respondent was unclear of its own proceedings. It is further set out in paragraphs 28 and 29 of the Applicant's First Affidavit (Encl. 5) that the Respondent did not at any time give any explanation on the burden of proof, the standard of proof, and as to who was to bear the burden. In fact, the Chairman had ordered the Applicant to come out with his defence 'straightaway'. To the query that the Respondent was not presenting witnesses the Chairman had stated:

> As far as we are concerned the report and the charges stand by themselves.

In so doing the Respondent had placed the burden of proof on the Applicant and as such presumed that the Applicant was guilty. This was contrary to law and to the rules of natural justice and procedural fairness. It was wrong for the Respondent to state that the "report and the charges stand by themselves" as for a charge to be established the Board must adduce evidence to prove the charge. The failure to do so will mean that the charges had not been proven beyond reasonable doubt, ie, the Board has not got any benefit of a presumption in law. In the case of *Re Lim Chor Pee* [1991] 2 MLJ 154 at page 162 Wee Chong Jin CJ stated:

> In taking on the burden of establishing this charge against the Respondent, the Law Society does not have the benefit of the presumption found in s. 96(2) of the Income Tax Act; it is therefore incumbent on the Law Society to adduce evidence to prove the charge. The burden is not on the Respondent to prove that he had not evaded payment of tax on the fee of $85,000.

In *The matter of an Advocate & Solicitor* [1978] 2 MLJ 7 the Court held:

> (2) the charge under section 84(2)(e) of the Legal Profession Act must be proved beyond reasonable doubt and in this case the evidence was insufficient to justify the Disciplinary Committee drawing the irresistible inference which led them to find that the respondent was guilty of the charge. Accordingly no order would be made on the application.

[15] In respect of natural justice and procedural fairness for decision-makers to be made up of different persons at different times the learned judge said:

I am of the opinion that it is contrary to natural justice and procedural fairness for decision-makers to be made up of different persons at different times. From the attendance list referred in paragraph 11 of the Applicant's Affidavit-in-Reply (Encl. 8) it is clear that the Respondent had included certain members of the Board who had not heard *viva voce* evidence at the hearing during the deliberations leading to the decision. This involved Ir. Abu Bakar Che Man, Ir. Kok Soo Chon and Encik P. Kasi (see paragraph 6(c) of Respondent's Affidavit (Encl. 6). It is observed that the Respondent's decision-making process involved persons who have not heard the evidence viva voce and this amounted to an error of law of which should be set aside. In the case of *Fulker v. Fulker* 3 All ER 636 wherein the Divisional Court set aside an order made by the justices on the grounds inter alia that as the order was based on evidence which had never been heard viva voce by two of the justices, it could not be upheld. Langton J remarked at page 640, "it was most important that all the justices adjudicating upon the evidence on which they were to make their findings should hear that evidence and not have it communicated to them through the medium of justices' clerk's note.

The Respondent had in paragraph 7 of the Respondent Affidavit-in-Reply (Encl. 9) stated that "the Board members were given full and unlimited access to the Respondent's documents were free to refer to the Transcript Notes and the cassette recording at all material times". The Applicant had replied in paragraph 10 of the Applicant's Affidavit (2) (Encl. 10) that "it is totally unacceptable and contrary to natural justice that my documents including the notes of transcript were not given to each and every Tribunal member but they were instead only given full and unlimited access and that they were further free to do so if they felt like it". Be that as it may, even if the members did refer to the transcript notes and cassette recordings it is an error of law on which the decision of the Tribunal depended on. In the case of *Mohan Rajadurai v. Majlis Perubatan Malaysia* [1998] 1 CLJ 903 which involved a disciplinary hearing in respect of a medical professional wherein the decision-makers were not made up of the same persons forming a body constituted by the Respondent having changed from day to day, Abdul Kadir Sulaiman J (as he then was) held at page 914:

> that under the circumstances it cannot be said that the decision made by the Respondent is correct in law because notwithstanding that the proceedings were recorded on audio tapes for the benefits of those who were not present during certain days of the proceedings they would merely be listening to the recorded voices of those who took part

A throughout but they were precluded from having the opportunity of seeing for themselves the demeanour of each of the witnesses when giving their evidence.

He also cited *Pearlman v. Keepers and Governors of Horrow School* [1979] 1 QB 56 in a *certiorari* proceedings, the statement of Lord B Denning MR at page 70:

> It is intolerable that a citizen's rights in point of law should depend on which judge tries the case, or in which court it is heard. The way to get things right is to hold thus: no C court or tribunal has nay jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will like to correct it.

The attendance list clearly shows that there were non-members of D the tribunal who were present during the deliberations leading to the decision. I think it is simply repugnant to natural justice that persons who are not members of the tribunal should be present during the deliberations even if they did not participate as their very presence give rise to the likelihood that they may have influenced the decision-makers. The question is not whether there E was actual prejudice against the Applicant or not. It is trite law that the courts do not go into the facts of the true case to see whether or not the appellant had been prejudiced in fact. The test is whether there is a "real likelihood" of bias in the facts of the case and this has to be ascertained with reference to the "right F minded persons". This has been cited by me in the case of *Tuan Hj. Maidin bin Hj. Manap v.Lembaga Jurukur Tanah Semenanjung Malaysia* [2001] 1 AMR page 178. In the case of *R v. Birmingham City Justice, ex parte Chris Foreign Foods (Wholesalers) Ltd.* [1970] 3 All ER 945 the Court held that the justice in exercise of his functions was under a duty to act openly, G impartially and fairly and the retirement of the justice in the company of two officials in order to take advice and the return of all three persons just prior to his decision amounted to a breach of natural justice since he did not inform the applicants of the advice tendered and give them an opportunity to counter it and H as a consequence granted an order of *certiorari* to quash the decision of the justice. In the instant case Ir. Dr. Judin bin Abdul Karim who was the Secretary of the Board was not only present but also had participated during the deliberations. The Respondent had not denied this. Ir. Dr. Judin bin Abdul Karim had co-authored the technical investigation report which had been relied I upon by the Ad-hoc Investigation Committee of the Board of Engineers and the Respondent in the preferment of charges against the Applicant a fact which had not been disclosed to the

Applicant at the hearing, (see paragraph 36 of the Applicant's Affidavit) (Encl. 5). Whilst the Applicant had consented to Ir. Dr. Judin bin Abdul Karim asking questions this consent was on the basis that he was the Board's expert and it would save time if he asked directly. (See paragraphs 34 and 35 of the Applicant's Affidavit) (Encl. 5). Instead of just asking for clarifications as an expert Ir. Dr. Judin bin Abdul Karim stepped into the arena and joined the fray by "cross-examining" and criticizing the Applicant's expert witness. The exchanges which clearly showed partisanship on the part of Ir. Dr. Judin bin Abdul Karim are set out in paragraph 36 of the Applicant's Affidavit (Encl. 5). The Applicant had shown in its table set out in paragraph 11 of the Applicant's Affidavit-in-Reply (2) (Encl. 10) the various disciplines of engineering or allied professions that the Board members belong to. Out of the nine members of the tribunal who were present throughout the hearing and the deliberations on 11.4.2000 and 13.7.2000 four were not civil engineers being namely, one mechanical engineer, three electrical engineers and a surveyor. The Respondent had claimed that the decision of the Board was grounded primarily on the evidence given by the Applicant's expert witness Professor Ang which was on civil engineering aspects. The Chairman who was an electrical engineer had himself during the hearing clearly displayed his lack of understanding of the technical discussions when he confessed that he did not know what "effective length" was:

…

I think it is totally improbable that the non-civil engineers have any understanding of the design factors especially on the "effective length" could have arrived at any conclusions based on the evidence tendered by Professor Ang without being influenced by Ir. Dr. Judin bin Abdul Karim. That being said it was totally repugnant to natural justice for Ir. Dr. Judin bin Abdul Karim to participate in the deliberations. The fact that he would have influenced the tribunal was therefore not a matter that there would be a real likelihood of bias on the part of the Respondent but that there was in fact actual bias on the part of the Respondent. In the case of the advice tendered by the legal advisor Mr. Yatiswara Ramachandaran this was certainly against the rules of natural justice. In the case of *R. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 28 MLJ 169 the Privy Council held:

> the right to be heard carries with it the right of the accused to know the case made against him, the evidence given and the statements made accepting him; and he must be given a fair opportunity to correct or contradict them. The Judge

A or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. The Court will not go into the likelihood of prejudice. The risk of it is enough. Applying these principles, applicant was not given a reasonable opportunity of being heard.

B

It is observed that the Board's legal advisor had been involved earlier in the preparation of the prosecution against the Applicant. It is also observed that the Applicant's preliminary objections were C against charges on jurisdictional grounds and also on the issue of the "complainant" and the issue on procedures. There were matters of which the legal advisor would have had an interest as he would have advised the Board on the same and ought to have advised the Board of the same. (See paragraphs 37 and 38 of the Applicant's Affidavit) (Encl. 5). In the premises, it was certainly D contrary for natural justice for the Respondent to receive representations albeit legal without disclosing this representation so that the Applicant was given a fair opportunity to correct or contradict them. Indeed, it would come as no surprise if the Respondent had assistance from their legal advisor in preparation E of their grounds of decision. The respondent had stated that all 12 members of the Board (the Applicant states that only 9 were eligible to make decision) had unanimously made the decision and it had primarily relied on the technical evidence issued by Professor Ang. I am of the opinion that the very unanimity of a large tribunal may render it improbable that all members exercised F a proper discretion. In *Cameron v. Duncan* [1965] 8 FLR 148 a majority of the Commonwealth Industrial Court concluded that the fact that "ten members of the executive council without question concurred in the findings recorded in these charges is difficult to comprehend except upon the basis that the findings were founded G on considerations other than those relevant to the charges. In the circumstances I think that if a layman were to peruse the technical evidence given by Professor Ang the layman could not have arrived at any conclusions without more. It is pertinent to note that the Respondent had insisted that it was primarily the evidence of Professor Ang that they had relied upon although this was H never stated in their grounds of decision. It is the submission of the Applicant that this was in knee jerk reaction to the Applicant's contention in the Applicant's Affidavit that the Respondent had not proffered any evidence in support of the charges. Be that as it may, it must be pointed out that the Respondent had found the I Applicant guilty of charges 2, 3 and 4. However, charges 2, 3 and 4 deal with matters concerning supervision and inspection and By-law 5 and By-law 7 of the Selangor Uniform Building By-laws 1986 respectively and a perusal of these charges and the grounds

of decision clearly show that this had nothing to do with Professor Ang's evidence which dealt primarily with design. It is observed that the Respondent had not even considered the evidence of 2 other persons namely Ir. Tay Yong Peng who had submitted his witness statement and Ir. Chooy Wei Seong who had given evidence (see notes of evidence at pages 004 and 071) (exhibits LPK-7) Applicant's Affidavit) (Encl. 5) as indicated in the Respondent's grounds of decision. The Applicant had stated in paragraph 6 of the Applicant further Affidavit (Encl. 5) that the quorum requirement was not met by the Respondent. In answer to this the Respondent in paragraph 27 of the Respondent Affidavit (Encl. 7) claims that the decision was made on 13.7.2000 and that they met with the quorum as there were 12 members who were qualified. The Respondent stated that "there are 15 members of the Board, including the President". It is observed that the Applicant challenged this number by exhibiting a copy of the list of the Board members issued by the Board itself (see paragraph 10 Applicant Affidavit in reply (Encl. 8) exhibit "LPK-1") and pointed out that at all material times the members of the Board numbered 17 and that the minimum two-thirds quorum would mean that the decision must be made by at least 12 qualified members. This number was subsequently confirmed by the Respondent (see paragraph 10 Respondent's Affidavit-in-Reply (Encl. 9)). It is absurd that the Respondent does not even know its own composition and numbers and yet was willing to state affirmatively in its Affidavit to this Court that the numbers were 15 when in fact it was 17. The Respondent claims in paragraph 11 of the Respondent Affidavit-in-Reply (Encl. 9) that the mistake was "unintentional". The numbers are of significance as it goes to the very root of whether the two-thirds quorum is met. If the Applicant and this Court had accepted the Respondent number "15" figure then the quorum would be 10 and the Respondent would have been able to better position themselves in a quorum challenge. I think that the two "unintentional mistakes" clearly show the lack of candour on the part of the Respondent.

Did the Respondent act honestly when they argued that under the Act it was irrelevant whether any member of the Tribunal participated at the deliberations leading to the decision or who they were (*inter alia* it was irrelevant whether Dato' Ir. Hj. Ahamd Zaidee Laidin who had left the *viva voce* hearing midway had participated) as the Respondent hears or decides as a body corporate? Was the position taken only to defend itself for having failed to comply with the mandatory quorum provision? Did the Respondent act honestly when they allowed Dr. Ir. Judin bin Abdul Karim, the Board's technical expert and Mr. Yatiswara

Ramachandaran, the legal expert to participate in the deliberations leading to the decision knowing full well that they were interested parties and not members of the Tribunal? Can it be said that the Respondent had acted honestly when the Respondent in its Affidavits had reiterated that it was not obliged to categorically deny the participation of Dr. Ir. Judin bin Abdul Karim in the deliberations only to disclose the truth for the first time to Court *vide* their further submissions dated 10.8.2001 that Dr. Ir. Judin bin Abdul Karim and Mr. Yatiswara Ramachandaran were present and had participated during deliberations *albeit* with immunity by virtue of Section 41 Interpretation Act 1948 and 1967? Can it be said that the Respondent acted honestly when it disclosed in it's Affidavit that the notes of evidence and other documents was available to all members without more when it knew or ought to have known whether all the members concerned had requested and sighted these documents? Can it be said that the Respondent had acted honestly when it changed it's mind that its decision was not made on 11.4.2000 but on 13.7.2000 after the Applicant had raised the issue that the Respondent had not considered the Applicant's further Submissions dated 23.5.2000? Can it be said that the Respondent had acted honestly when its replies to the queries raised by the Applicant as to who had attended the deliberations leading to decision were inconsistent? (see Section E - Allegation of lack of candour in the Applicant's reply to the Respondent's Written Submissions page 22). Did the Board "convict" the Applicant by honest means by not divulging the identity of the complainant to the Applicant (in spite of letters requesting for this) and by further misleading the Applicant at the hearing on 9.8.1999 by insisting that MPSA was a complainant *albeit* only on the collapse of the bridge when such was not the case? Did the Board act honestly (after the Applicant had elicited evidence from the MPSA that the MPSA had not complained to the Board at all and had farther confirmed that no charges had been brought against the Applicant), when it decided that it could proceed without a complainant after the close of the proceedings? Can it be said that the Board acted by honest means when the Board deprived the Applicant of the opportunity to confront his accuser and had acted as accuser, judge and executioner? (see *Tuan Haji Maidin*'s case page 164 line 35). Did the Respondent act by honest means when it decided that its function at disciplinary hearing is "investigatory in nature" and that "it is not adversarial or inquisitorial"? Is it not a fact that the Respondent has stated in it's charge sheet that "The Board after conducting investigation has decided to hold a hearing under Section 15(2) of the Registration of Engineers Act 1967 where you are required to answer the following charges?" and if so when does the investigating stop and the hearing begin? Did the Respondent act honestly in bringing about charges 3, 4 and 5 which rightfully

was within the purview of the Local Authorities, or was it the case of the Respondent wanting to throw the book at the Applicant because of the publicity surrounding the incident? Was it not a fact that charges 3 and 4 were never recommended by the Ad-hoc Committee? Did the Respondent act honestly in concluding that the Applicant was guilty of charges 2, 3 and 4 when the Respondent had categorically stated that "the evidence that in fact convinced the Board that the Applicant was guilty of 4 of the charge brought against him was the evidence of the Applicant's own principal witness, Prof Ang Thein Cheong" (see page 12 Affidavit of Ashari bin Mohd. Yakub affirmed on 4.4.2001)? Is it not a fact that the Respondent had never rebutted the Applicant's averment that Prof. Ang's evidence dealt only with the design elements and had nothing to do with charges 2, 3 and 4? Did the Respondent act honestly when it "convicted" the Applicant charges 2, 3 and 4 having been convinced by irrelevant evidence i.e. that of Prof. Ang (see argument aforesaid) and at the same time totally ignored the evidence of two witnesses Ir. Tay Yong Peng and Ir. Chooy Wei Seong whose evidence was relevant to charges 2, 3 and 4. Is this not a case of the Respondent's failure to take into account relevant considerations and taking into account irrelevant considerations? Did the Respondent act honestly in stating in its decision that it agreed with the Applicant's learned counsel submission that a high standard of proof must be satisfied before the various charges are made out against the Applicant and that if the evidence at any point was ambiguous the Applicant should be given the benefit of a doubt. How then can the Respondent honestly be able to reconcile its position as set out earlier. Can the Respondent honestly say that it did not presume the Applicant guilty until otherwise proven? Do the notes of evidence not show that the Chairman had stated that "... as far as we are concerned the report and the charges stand by themselves" (see page 003 Note of Transcript exhibit PKL-7, encl.) and that the Respondent did not lead any evidence against the Applicant at all. Can the Respondent honestly say it's Chairman and some members of the Board were not biased. Is this not reflected in the Notes of Transcript by the partisan behaviour of the Chairman and other members jumping into the fray during the proceedings. Did the Respondent "convict" the Applicant by honest means when the Respondent had it's mindset base on Regulation 23 i.e. "Every Registered Engineer shall at all times uphold the dignity, high standing and reputation of his profession" whereas the Applicant was actually charged under Regulation 24 i.e. "A Registered Engineer in his responsibility to his employer, client or the profession shall have full regard to the public interest"? This especially also when the Respondent had not presented it's case as to what full regard to the public interest meant. Can the

Respondent honestly say that it had acted honestly and by honest means in the conduct of the proceedings? If this was so, why was it then when challenged in this Court, it did not explain fully what the Respondent have done and why the Respondent had done it but instead was partisan in its own defence? Was it not the case of Respondent wanting to make an example of the Applicant and to secure a "conviction" at all costs? Can the Respondent honestly say that it was unaware that a Local Authority/Statutory Body whose decision is challenged in judicial review proceedings should, like the judge of an inferior court, not to be partisan in those proceedings and should, in the interest of high standards of public administration, assist the court by disclosing, so far as necessary, such reasons as are adequate to enable the court to ascertain whether the Local Authority was in error in reaching its decision by taking into account irrelevant considerations or not taking into account relevant considerations? Can it be said that the Respondent acted honestly when it used 15 as the total number of Board members in its Affidavit in the all important quorum issue only to change its mind subsequently that the actual number was 17 after the Applicant had produced evidence to that effect? Is it conceivable that the Respondent as a statutory body with a permanent secretariat does not even know its numbers? There are too many questions to be answered when the honesty test – failure to act honestly and by honest means is put. In the instant case I am of the opinion that the Respondent has failed to act honestly and by honest means.

[16] Having gone through the voluminous record of appeal it is clear to me that the learned judge had studied all the evidence produced before him whether by affidavits and documents made available and he came with a very comprehensive judgment. I have the opportunity of reading that judgment of his, of which the important passages I have cited above and it is clear to me that the learned judge took great pain in producing the judgment. The learned judge supported his decision with the evidence before him. The learned judge had also cited the relevant laws and the authorities to support his judgment.

[17] It is clear to me that the learned judge had committed very limited error if at all. I could not find any merit in the submissions of the appellant/respondent in defaulting the judgment of the learned judge. Though the learned judge had repeated himself in respect of some of the evidence that appears to be his style of emphasising the point.

[18] For the above reasons, we could not find any merit in the appeal, and we dismissed the appeal with costs. The order of the learned judge is hereby affirmed. The deposit, if any, is to the account of taxed costs.

[19] My learned brother, Vincent Ng Kim Khoay JCA, had seen this judgment in draft and has conveyed his agreement to it. My learned brother, Dennis Ong Jiew Fook JCA has since retired.